(19,272.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 209.

DANIEL N. HOLDEN AND LIZZIE HOLDEN, BANKRUPTS, PETITIONERS,

vs.

J. A. STRATTON, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Ninth Circuit.

In re D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —

Designation of Record under Rule 23.

To the above-named bankrupts and to P. P. Carroll, your solicitor:

You and each of you will please take notice that the error of the district court upon which the undersigned trustee intends to rely in his petition for revision and review from the order of the district court for the district of Washihgton, northern division, dated July 16th, 1901, which petition has heretofore been filed and copy thereof served upon you, is the error of adjudging an exemption in favor of you and each of you of the two policies of insurance referred to in that petition. As necessary for the consideration thereof the petitioner aforesaid designates the following portions of the record to be printed:

1. Order consolidating causes 1953 and 1954.
2. Adjudication of bankruptcy.
3. Order of district judge awarding insurance exemption.
4. The insurance policies.
5. The petition for revision and review.
6. The notice of filing and calling up the petition for revision and review.

BAUSMAN & KELLEHER,
Solicitors for J. A. Stratton, Trustee in Bankruptcy of D. N. Holden and Lizzie Holden, Bankrupts.

Due service of foregoing designation of record under rule 23, and receipt of copy thereof, duly admitted this 7th day of August, 1901.

P. P. CARROLL,
By J. E. C.,
Solicitor for D. N. Holden and Lizzie Holden, Bankrupts.

(Endorsed:) 729. In the United States circuit court of appeals for the ninth circuit. *In re* D. N. Holden and Lizzie Holden, bankrupts. Designation of record under rule 23. Filed August 10, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In re D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts.

Stipulation as to Certdin Facts.

It is hereby stipulated and agreed by and between Bausman and Kelleher, solicitors for J. A. Stratton, appellant and trustee, and P. P. Carroll, solicitor for said bankrupts, appellees:

That for the purpose of said appeal, it is admitted that Schedule "A," attached to said bankrupts' answer and cross-petition,
2 filed February 9th, 1901, shows that all and every of the liabilities of said bankrupts were made and contracted between the first day of September, 1900, and the first day of December, 1900; and that Schedule "A," attached to said bankrupts' claim of exemptions, filed April 4th, 1901, shows that said bankrupts' claim that the life-insurance policies in controversy in this appeal are exempt under that certain law of the State of Washington, approved March 20, 1895, and as amended by an act of the legislature of said State, approved March 10, 1897; which said law as amended appears in the published laws of said State, designated as the Laws of Washington, session of 1897, page 70.

BAUSMAN & KELLEHER,
Solicitors for Appellant.
P. P. CARROLL,
Solicitor for Appellees.

(Endorsed:) No. 729. In the United States circuit court of appeals. *In re* D. N. Holden and Lizzie Holden, bankrupts. Stipulation as to certain facts. Filed August 19, 1901. F. D. Monckton, clerk. P. P. Carroll, solicitor for appellees.

In the District Court of the United States for the District of Washington, Northern Division. In Bankruptcy.

In the Matter of the Bankruptcy of D. N. HOLDEN. No. 1953.

In the Matter of the Bankruptcy of LIZZIE HOLDEN. No. 1954.

Order Consolidating Causes.

On motion of P. P. Carroll, attorney for respondents D. N. and Lizzie Holden, and counsel for petitioners in open court agreeing thereto:

It is ordered that said causes be, and are hereby, consolidated; and that respondents be, and are hereby, allowed to join in one and the same answer to said petitions.

C. H. HANFORD, *Judge.*

(Endorsed:) Order. Filed in the United States district court, district of Washington, 10 a. m. February 9, 1901. R. M. Hopkins, clerk. H. M. Walthew, deputy.

In the District Court of the United States for the District of Washington, Northern Division.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. Nos. 1953, 1954. Consolidated.

Adjudication of Bankruptcy.

The above-entitled matter having been referred to the undersigned, and the same coming on to be heard upon the petition of the creditor and the answer and cross-petition of the re-
3 spondents, said creditor appearing by its attorneys, Bausman, Kelleher & Emory, and the respondents appearing by their attorney, P. P. Carroll, it is considered that the said respondents, and each of them, are bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy.

Whereupon, it is ordered and adjudged that the said respondents, D. N. Holden and Lizzie Holden, and each of them, be, and they are hereby, declared bankrupt accordingly.

Dated at Seattle in said district on this 25th day of February, A. D. 1901.

JOHN P. HOYT,
Referee in Bankruptcy.

(Endorsed:) Adjudication of bankruptcy. Filed in the United States district court, district of Washington, July 19, 1901, 10.30 a. m. R. M. Hopkins, clerk. H. M. Walthew, deputy. Filed February 25th, 1901, at 11 o'clock a. m. John P. Hoyt, referee.

In the District Court of the United States for the District of Washington, Northern Division.

In the Matter of the Bankruptcy of D. N. and LIZZIE HOLDEN. Nos. 1953, 1954. Consolidated.

Order Allowing Exemptions.

This cause coming on this 15th day of July, 1901, to be heard on the report of the referee, filed herein on the 17th day of June, 1901, and the exceptions of said bankrupts to said report in denying to said bankrupts their claim of exemptions to the following life-insurance policies, to wit: policies numbered 206,383 and 303,921, issued on the 15th day of June, 1894, by the Northwestern Life In-

surance Company, of Milwaukee, Wisconsin; and the court, after hearing arguments of counsel for and against said report, being fully satisfied in the premises, allows the exemption of said policies claimed by said bankrupts.

Wherefore, it is ordered and adjudged that the report of the referee be, and the same is hereby, vacated and set aside, and that the bankrupts, D. N. Holden and Lizzie Holden be, and they are hereby, allowed their said claim of exemption as to said life-insurance policies; and it is further ordered and adjudged that the said life-insurance policies be and they are hereby exempt from all debts and liabilities of said bankrupts, and from all claims of every kind and character made in these proceedings by the creditors of said bankrupts, and that said life-insurance policies be returned to said bankrupts.

Done in open court this 16th day of July, 1901.

C. H. HANFORD, *Judge.*

(Endorsed:) Order allowing exemptions. Filed in the United States district court, district of Washington, 11.45 a. m., July 17, 1901. R. M. Hopkins, clerk. H. M. Walthew, deputy.

4 Policy No. 206,383.

206,383, number. Age, 30.
Amount, $5,000. Premium, $233.80.

The Northwestern Mutual Life Insurance Company, by this policy of assurance,

in consideration of the statements made in the application for this policy, which is hereby referred to and made a part of this contract, and in further consideration of the payment, at the company's office in Milwaukee, Wisconsin, of two hundred thirty-three and $\frac{80}{100}$ dollars, and of the annual payment of a like sum, to be made at said office, at or before noon on or before the 21st day of May in every year during the first ten years from May 21, 1890, date of former policy, promises to pay, at its said office, unto Lizzie Holden, beneficiary, wife of Daniel N. Holden, the insured, of Seattle, in the county of King and State of Washington, the sum of five thousand dollars, in sixty days after due proof of the fact and cause of the death of said insured during the continuance of this policy; the balance of the year's premium, if any, and any other indebtedness to the company on account of this policy being first deducted therefrom; provided, however, that if the said beneficiary shall not survive the said insured then such payment shall be made to the executors, administrators or assigns of the said insured.

This policy is issued on the semi-tontine plan, and its tontine dividend period is twenty years.

This policy shall, if kept in force, share in the surplus, according to the company's usage, at each distribution after twenty years from May 21, 1890, until all contributions to the surplus found in the course of making such distributions to have arisen from this policy shall have been returned; but no dividend shall be payable at or after the time default may be made in the payment of any premium.

And the said company further promises and agrees that if, after three or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium on the day it shall become due, this contract shall secure paid-up non-participating insurance for as many tenth parts of the original sum insured as there shall have been complete annual premiums so paid, on condition that this policy be freed from all indebtedness to the company; and a paid-up policy will be issued accordingly on surrender of this policy.

This policy shall not bind the company until the first premium shall be actually paid, while the said insured is in good health, to the company or to some person authorized by the company to receive it, and is issued and accepted by the parties in interest on the express conditions stated on the second page of this policy, which are hereby made part of this contract.

In witness whereof the Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract, this fifteenth day of June, one thousand eight hundred and ninety-four.

H. L. PALMER, *President.*

J. W. SKINNER, *Secretary.*

The following is endorsed upon the face of said policy:

Upon surrender by the insured and beneficiary of a policy for $10,000 of like number and kind, dated May 21, 1890, this policy, for $5,000 is issued at their request in lieu of one-half of the former policy; in all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life non-participating policy, number 303,921, for $2,000 is issued in consideration of the surrender of one-half of the original policy.

Milwaukee, Wis., July 6, 1894.—Premiums on this policy may be paid semi-annually by paying in lieu of the annual premium as stated therein the semi-annual cash premium of one hundred twenty-one and $\frac{20}{100}$ dollars on the 21st day of May and November in each year.

Conditions Referred to on the Preceding Page of this Policy.

1st. If the said premiums shall not be paid at or before the times within mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine; and no premium after

the first, hereby acknowledged, shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary, and the payment and receipt of any premium less than a full annual shall not have the effect to continue this policy in force longer than three months in case of a quarterly payment, or six months in case of a semi-annual payment.

2d. If any fraudulent representation or statement shall be made in the application for this policy, or if, within two years from the date hereof, the said insured shall pass south of the tropic of cancer, or shall be personally engaged in blasting, mining or submarine operations, or in the production of highly inflammable or explosive substances, or as engineer or fireman of any locomotive engine, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad, except as passenger or sleeping-car conductor, mail agent, express messenger, or baggage master, or in ocean navigation, or shall enter or be engaged in any military or naval service (except in time of peace), or shall undertake an aerial voyage, or shall die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be null and void.

3d. If the age has not been understated and death shall occur later than three years from the date hereof, the liability of the company shall not be disputed on account of any statement in the application, except in case of actual fraud.

4th. In every case where this policy shall cease or become
6 void, all payments thereon shall be forfeited to the company, but paid-up insurance will be granted as within provided.

5th. If, within five years from the date hereof, the said insured becomes habitually intemperate, or so far intemperate as to induce delirium tremens, then and in either such case the company may, within said five years, but during *this* lifetime, cancel this policy, and thereupon shall be absolved from all liability upon the same, except only that it shall pay the amount of the reserve, computed according to the now existing standard of the State of Wisconsin, if this policy be surrendered in the lifetime of the insured and within one year from the cancellation of the same.

6th. If this policy shall be assigned, a duplicate of the assignment shall, within thirty days, be given to the company, and due proof of interest shall be produced on making claim.

7th. No dividend shall be allowed or paid upon this policy unless the insured shall survive the completion of its tontine dividend period, and unless this policy shall then be in force.

8th. The condition last preceding being contained in all policies issued on the semi-tontine plan, all savings made in consequence of it shall be apportioned equitably among such policies issued on that plan as shall complete their tontine dividend periods; and in making such apportionment, savings from lapses occurring in any year shall be distributed among those policies only upon which premiums shall have been payable in that year.

9th. Upon the completion of the tontine dividend period, provided his policy shall not have been terminated previously by lapse or death, the said insured, and his assigns, if creditors, shall, without the consent of any other person named within as beneficiary, have the option either:

First, to withdraw in cash the accumulated surplus apportioned by the company to this policy, leaving the policy participating and full paid for its face;

Secondly, on furnishing satisfactory proof that the insured is then in good health, to apply said surplus to the purchase of a non-forfeitable participating paid-up addition to the face of this policy; or, without proof of good health, to apply said surplus to purchase an annuity at the company's published rates;

Thirdly, to surrender this policy and receive therefor in cash its entire share of assets, that is, the accumulated reserve, together with the surplus apportioned, which reserve the company guarantees shall not be less than twenty-four hundred nine and $\frac{55}{100}$ dollars in addition to said surplus; or

Fourthly, to surrender this policy and apply said entire share of assets to the purchase of a non-participating paid-up policy, payable in case of death to the beneficiary therein named, if any, or otherwise to the executors, administrators or assigns of the said insured, provided that satisfactory proof be furnished that the insured is then in good health.

If no notice in writing of the way elected in which to apply the tontine dividend be given to the company within sixty days
7 after the completion of the tontine dividend period, then the tontine dividend shall be applied in the first way mentioned.

10th. No note can be accepted for any premium, nor can this policy be restored, in case of default in the payment of any premium, later than sixty days after the date of such default, and then only provided the insured furnishes evidence of good health, and provided also that the premium be paid with interest at the rate of seven per cent. per annum, before the expiration of said sixty days.

Filed in the United States district court, district of Washington. June 17, 1901.

R. M. HOPKINS, *Clerk.*
H. M. WALTHEW, *Deputy.*

Policy No. 303,921.

Number 303,921. Age, 34.
Amount, $2,000. Premium, ——.

The Northwestern Mutual Life Insurance Company, by this policy of assurance,

in consideration of the statements made in the application heretofore made for policy numbered 206,383, which application is hereby

referred to and made a part of this contract, and in further consideration of the surrender of one-half of said policy, promises to pay, at its office, in Milwaukee, Wisconsin, unto Lizzie Holden, beneficiary, wife of Daniel N. Holden, the insured, of Seattle, in the county of King, State of Washington, the sum of two thousand dollars, in sixty days after due proof of the fact and cause of the death of said insured during the continuance of this policy; provided, however, that if the said beneficiary shall not survive the said insured, then such payment shall be made to the executors, administrators or assigns of the said insured.

This policy shall have no participation in the surplus of the company.

This policy is issued and accepted by the parties in interest on the express conditions stated on the second page of this policy, which are hereby made part of this contract.

In witness whereof, The Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract, this fifteenth day of June, one thousand eight hundred and ninety-four.

H. L. PALMER, *President.*
J. W. SKINNER, *Secretary.*

Conditions Referred to on the Preceding Page of this Policy.

1st. If no fraudulent representation or statement has been made in the original application upon which this policy is based, and if the age has not been understated, the liability of the company
8 shall not be disputed on account of any statement in said application.

2d. If within five years from May 21, 1890, the said insured becomes habitually intemperate, or so far intemperate as to induce delirium tremens, then and in either such case the company may, within said five years, but during his lifetime, cancel this policy, and thereupon shall be absolved from all liability upon the same, except only that it shall pay the amount of the reserve, computed according to the now-existing standard of the State of Wisconsin, if this policy be surrendered in the lifetime of the insured and within one year from the cancellation of the same.

3d. If this policy shall be assigned, a duplicate of the assignment shall, within thirty days, be given to the company, and due proof of interest shall be produced on making claim.

Filed in the United States district court, district of Washington. June 17, 1901.

R. M. HOPKINS, *Clerk.*
H. M. WALTHEW, *Deputy.*

(Endorsed:) No. 729. In the United States circuit court of appeals for the ninth circuit. *In re* D. N. Holden and Lizzie Holden, bankrupts. Transcript of certain proceedings. Filed Aug. 10, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In re D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —.

Petition for Revision and Review of Order of District Court in Bankruptcy.

To the honorable the judges of the United States circuit court of appeals for the ninth circuit:

The petition of J. A. Stratton respectfully shows as follows:

I.

In the district court of the United States for the district of Washington, northern division, two separate proceedings were begun against D. N. Holden and Lizzie Holden, his wife, on the 19th day of January, 1901, to the end that they each be declared a bankrupt, and on the 9th day of February, 1901, these two proceedings were consolidated.

II.

Thereafter, on the 25th day of February, 1901, each of the aforesaid Holdens was adjudged a bankrupt, and thereafter, in the same proceedings, your petitioner became the duly elected and qualified trustee in bankruptcy of each of their estates under the laws of the United States.

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III.

Thereafter the aforesaid bankrupts, and each of them, claimed exemption in their favor of two ceriain policies of life insurance in the hands of the trustee upon the life of D. N. Holden, payable to Lizzie Holden, the wife. Of these policies copies are hereto annexed and made a part of this petition. As therein appears, these policies are respectively in the sum of $5,000 and $2,000 in the event of death, and have a present cash surrender value combined of about $2,200.

IV.

Such proceedings were had upon this application for exemption that the claim of the bankrupts was on the 17th day of June, 1901, denied by the referee; but upon certification of the matter to the district court, his action was, on July 16th, 1901, overruled and the exemption in favor of the bankrupts by order was allowed.

V.

Your petitioner, considering himself aggrieved by this order of the district court, respectfully applies to this honorable court for a revision and review thereof to the end that the claim of exemption of the bankrupts of these policies of insurance may be denied and the action of the lower court corrected, and that such orders emanate from this court as are necessary to that end. For this purpose your petitioner annexes hereto a certified copy of so much of the record as will enable your honorable court to review and correct the action of the district court with due care and justice to all concerned.

J. A. STRATTON,
As Trustee in Bankruptcy of D. N. Holden and Lizzie Holden, Bankrupts, Petitioner,
BAUSMAN & KELLEHER,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
District of Washington, County of King, } ss:

J. A. Stratton, being first duly sworn, on oath says: That he is the petitioner named in the foregoing petition; that he has read the same, knows the contents thereof and believes the same to be true.

J. A. STRATTON.

Subscribed and sworn to before me this 20th day of July, 1901.

[SEAL.] JAY C. ALLEN,
Notary Public in and for the State of Washington, Residing at Seattle.

(Endorsed:) No. 729 Original. In the United States circuit court of appeals. *In re* D. N. Holden and Lizzie Holden, bankrupts. Petition for revision and review of order of district court in bankruptcy. Filed August 5, 1901. F. D. Monckton, clerk.

10 In the United States Circuit Court of Appeals for the Ninth Circuit.

In re D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —.

Notice of Petition for Revision.

To D. N. Holden and Lizzie Holden, bankrupts, and to P. P. Carroll, your solicitor:

You and each of you will please take notice that J. A. Stratton, trustee in bankruptcy in those certain consolidated causes numbered

1953 and 1954, in the district court of the United States for the district of Washington, northern division, wherein you were adjudged bankrupts, has filed in the United States circuit court of appeals for the ninth circuit his petition for a revision of that certain order of the district court aforesaid in the consolidated causes aforesaid made on the 16th day of July, 1901, allowing your claim of exemption of certain policies of insurance therein considered and reversing the ruling of the referee denying that exemption.

You will also take notice that the aforesaid trustee will call up for hearing the aforesaid petition at the regular annual Seattle term of the United States circuit court of appeals for the ninth circuit, to be held on the second Monday of September next in the court-room of the United States district court for the district of Washington, northern division, in the city of Seattle, Washington, at the hour of eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

BAUSMAN & KELLEHER,
Solicitors for J. A. Stratton, Trustee in Bankruptcy of D. N. Holden and Lizzie Holden, Bankrupts.

Received a copy of the foregoing notice, together with copy of petition for revision and record, this 7th day of August, 1901.

P. P. CARROLL,
By J. E. C.,
Solicitor for D. N. Holden and Lizzie Holden, Bankrupts.

(Endorsed:) 729. Original. In the United States circuit court of appeals for the ninth circuit. *In re* D. N. Holden and Lizzie Holden, bankrupts. Notice of petition for revision. Filed Aug. 10, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In re D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. —.

Stipulation.

It is hereby stipulated and agreed by and between Bausman and Kelleher, solicitors for J. A. Stratton, appellant and trustee, and P. P. Carroll, solicitor for said bankrupts, appellees:

11 That for the purpose of said appeal, it is admitted that Schedule "A," attached to said bankrupts' answer and cross-petition, filed February 9th, 1901, shows that all and every of the liabilities of said bankrupts were made and contracted between the first day of September, 1900, and the first day of December, 1900; and that Schedule "A," attached to said bankrupts' claim of exemptions, filed April 4th, 1901, shows that said bankrupts claim that the life-insurance policies in controversy in this appeal are ex-

empt under that certain law of the State of Washington approved March 20, 1895, and as amended by an act of the legislature of said State, approved March 10, 1897; which said law as amended appears in the published laws of said State, designated as the Laws of Washington, session of 1897, page 70.

BAUSMAN AND KELLEHER,
Solicitors for Appellant.
P. P. CARROLL,
Solicitor for Appellees.

(Endorsed:) Stipulation as to certain facts. Filed August 19, 1901. F. D. Monckton, clerk.

In the District Court of the United States for the District of Washington, Northern Division.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. Nos. 1953, 1954. Consolidated.

Answer.

To the Honorable C. H. Hanford, judge of said court:

Comes now the above-named respondents D. N. Holden and Lizzie Holden, and by leave of court, consolidating said causes, join herein in this answer and response to the petition of the First National Bank of Seattle:

I.

Respondents admit the matters and things alleged in paragraphs I, II and III of the petition of said bank.

II.

Referring to the fourth paragraph of said petitions, respondents admit that said D. H. Holden and Lizzie Holden are insolvent, but respondents deny each and every other allegation made and contained therein.

III.

Respondents deny each and every allegation made and contained in the fifth paragraphs of said petitions of said bank, except as to the giving of the deed for $15,000.00 and the recording thereof.

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IV.

Referring to the sixth paragraphs of said petitions, respondents admits that the conveyance referred to in said paragraphs "consists of the whole of said Holden's real estate;" but respondents deny each and every other allegation made and contained therein.

V.

Respondents deny each and every allegation made and contained in the seventh paragraphs of said petitions.

Respondents further answering said petitions respectfully show unto your honor:

I.

That respondents are now and at all the times and dates hereinafter mentioned were husband and wife.

II.

That on or about the 1st day of November, 1900, respondents owned one-half of the capital stock of the Holden and Wilson Furniture Company, a corporation organized under the laws of the State of Washington and *was* doing business in the city of Seattle, in said State; and that on said day Howard D. Thomas, Jr., was the owner of 175 shares of the capital stock of said company; and because of differences between respondents and said Thomas, respondents thought it best for their business interest in said company to buy the said stock of the said Thomas, and respondents agreed with said Thomas to buy said stock for $22,000.00, and said Thomas agreed to sell his said stock for $22,000.00 to respondents.

III.

That on the 5th day of November, 1900, respondents obtained a loan of eleven thousand five hundred dollars ($11,500.00) from Eugene F. Lawson; and that the money borrowed from said Lawson was paid according to agreement to said Thomas for his said stock; and respondent- gave to said Lawson their promissory note for said eleven thousand five hundred dollars ($11,500.00) payable ten days after date with — per cent. interest per annum, and to secure the payment of said note respondents delivered to said Lawson 175 shares of the capital stock of said company and the said Lawson was also to have as security the said stock of the said Thomas as soon as the same came into the possession of respondents.

IV.

That on or about the first day of December, 1900, respondents borrowed of said Lawson the further sum of thirty-five hundred dollars ($3500.00) and to secure the repayment of the same and the said note for $11,500.00 took up said note of November 5th,
13 1900, for $11,500.00 and the said stock held as security and gave their note to said Lawson for fifteen thousand dollars ($15,000.00), payable January 1, 1901, with interest at six per cent. per annum, and to secure the payment of the said note for $15,000.00,

gave a mortgage on all their real property, which mortgage was recorded in the auditor's office of said King county on the 12th day of December, 1900, and the money borrowed as aforesaid was expended as aforesaid and in the conduct of the said business of respondents.

V.

That on or about the 11th day of December, 1900, being convinced of their inability to pay said note for $15,000.00, to save expense and litigation, respondents deeded all their said real property to said Lawson in full satisfaction of said debt and the payment of said note, interest and mortgage.

Respondents further represent and show unto your honor:

I.

That on or about the 4th day of December, 1900, a receiver was appointed for the said Holden and Wilson Furniture Company, a corporation organized and doing business under the laws of the State of Washington, as hereinbefore in this answer set forth in the cause numbered 30,467 in the superior court of said State in and for the county of King, entitled The Seattle Mattress and Upholstery Company, plaintiff, *v.* The Holden and Wilson Furniture Company, defendant, and that the failure of said furniture company was the real cause of the failure of respondents.

II.

That respondents have resided in the city of Seattle, King county, Washington, for more than six months last past, and have had their principal place of business in said city; and that during said time respondents were engaged in the business and occupation of buying and selling household goods, fixtures and furniture within the said judicial district.

III.

That respondents owe debts which they are unable to pay; that they are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law; and respondents desire to obtain the benefit of the acts of Congress relating to bankruptcy.

IV.

That the schedule hereto annexed marked A, and verified by your petitioners' oaths, contain a full and true statement of all their debts, and (so far as it is possible to ascertain) the names
14 and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioners' oaths, contains an accurate inventory of all their property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that they may be adjudged by the court to be bankrupts within the purview of said acts.

D. N. HOLDEN.
LIZZIE HOLDEN.

P. P. CARROLL, *Attorney.*

UNITED STATES OF AMERICA, } ss:
District of Washington, }

We, D. N. Holden and Lizzie Holden, the respondents mentioned and described in the foregoing answer, do hereby make solemn oath that the statements contained therein are true according to the best of our knowledge, information and belief.

D. N. HOLDEN,
LIZZIE HOLDEN,
Respondents.

Subscribed and sworn to before me this 8th day of February, A. D. 1901.

[NOTARIAL SEAL.]

P. P. CARROLL,
Notary Public in and for the State of Washington, Residing at Seattle.

15

SCHEDULE "A."

Name of creditors.	Residence.	When and where contracted.	Nature and consideration.	Amount.
Holden & Wilson Furniture Company.	Seattle, Wash.	Seattle, Wash..	Merchandise and money loaned.	$10,371.02
Howard D. Thomas, Jr	"	11, 5, '00 ..... ditto.	Stock purchased.	6,000.00
First national bank	do.	Between Sept. 1 and Dec. 1, 1900, at Seattle, Wash.	Money loaned.	5,150.00
Louch, Augustine & Co	do.	do.	Merchandise	204.85
Z. C. Miles & Piper Co	do.	do.	do.	12.40
A. J. Prayer & Sons	do.	do.	do.	64.00
F. A. Buck & Co	do.	do.	do.	285.00
Seattle Ice Co	do.	do.	do.	15.00
Aggers-Bosworth Co	do.	do.	do.	22.88
Diamond Ice Co	do.	do.	do.	14.25
Hardy-Hall Arms Co	do.	do.	do.	37.85
The Kerry Lumber Co	do.	do.	do.	38.52
Lilly, Bogardus Co.....	do.	do.	do.	42.39
Lowman & Hanford	.....	.....	.....	
Stationery & P. Co	do.	do.	Printing.....	51.25
Newells Mill & Mfg. Co	do.	do.	Lumber	110.00
Pioneer Printing Co	do.	do.	Printing.....	76.25
O. W. Peterson & Co	do.	do.	Merchandise.	29.75
Pacific Printing Co	do.	do.	Printing.....	16.50
Eureka Baking Co	do.	do.	Merchandise.	58.00
Royal Dairy Co	do.	do.	do.	100.00
The Seattle Electric Co	do.	do.	Advertising..	10.00
Standard Oil Co	do.	do.	Merchandise.	16.92
Seattle City Bill Posting Company.	do.	do.	Advertising..	61.66
M. Seller & Co	do.	do.	Merchandise.	40.28
The John Schram Co.....	do.	do.	do.	52.00
Howard D. Thomas, Jr	do.	do.	Suit pending.	4,500.00
James Brownie	do.	do.	Judgment ...	225.00
Gordon & Co	do.	do.	do.	228.78
Pacific Coast Co	do.	do.	Coal	62.80
G. H. Braas	do.	do.	Photographs.	12.00
Schwabacher Hardware Co ..	do.	do.	Merchandise.	50.23
Stetson & Post Mill Co	do.	do.	do.	27.32
Galbrath, Bacon & Co	do.	do.	do.	37.85
Total	.....	.....	.....	$28,024.75

D. N. HOLDEN,
LIZZIE HOLDEN,
Respondents.

16 UNITED STATES OF AMERICA, } ss:
District of Washington, }

On this 8th day of February, A. D. 1901, before me personally came D. N. Holden and Lizzie Holden, the persons mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule, to be a statement of all their estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

[NOTARIAL SEAL.] P. P. CARROLL,
Notary Public in and for the State of Washington, Residing at Seattle.

SCHEDULE "B."

Respondents own or control no property, real or personal, other than their household furniture, goods and personal effects of about the value of five hundred dollars ($500.00).

D. N. HOLDEN,
LIZZIE HOLDEN,
Respondents.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

On this 8th day of February, A. D. 1901, before me personally came D. N. Holden and Lizzie Holden, the persons mentioned in and who subscribed to the foregoing schedule, and who, being duly sworn, did declare the said schedule to be a statement of all their estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

P. P. CARROLL,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

SEATTLE, *Feb'y 8th*, 1901.

Rec'd copy of the within answer.

BAUSMAN, KELLEHER & EMORY,
Att'ys for Petitioner First National Bank of Seattle.

(Indorsed:) Answer. Filed in the U. S. district court district of Washington Feb. 9, 1901 at 4 p. m. R. M. Hopkins, clerk, H. M. Walthew, deputy.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I, R. M. Hopkins, clerk of the district court of the United States for the district of Washington, do hereby certify that I have com-

pared the foregoing copy with the original answer of bankrupts in the foregoing entitled cause, now on file and of record in my office at Seattle, and that the same is a true and perfect transcript of said original and of the whole thereof.

17 Witness my hand and the seal of said court this 13th day of September, 1901.

R. M. HOPKINS, *Clerk*,
By H. M. WALTHEW, *Deputy*.

(Endorsed:) U. S. circuit court of appeals for the ninth circuit. No. 729. Certified copy of answer. Filed September 13, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Before McKenna, circuit justice, and Gilbert and Ross, circuit judges.

McKENNA, *Circuit Justice:*

This is a petition filed under section 24–*b* of the bankruptcy law of 1898, to renew and order of the district court for the district of Washington, northern division, made and entered in the above-entitled cause.

The said D. N. Holden and Lizzie Holden were separately proceeded against in bankruptcy by their creditors. The causes were consolidated by consent, and "one and the same answer" filed to the petitions. Subsequently it was adjudged that the "respondents and each of them are bankrupts within the true intent and meaning of the acts of Congress relating to bankruptcy."

The respondents then prayed exemption from the claims of creditors of two life insurance policies. The claim was disallowed by the referee who made due report of his action to the court. The respondents filed exceptions to the report, and after hearing, the court, by an order duly entered on the 16th of July, 1901, vacated the report and adjudged the policies to be exempt. To review this order of the district court the present petition was filed by J. A. Stratton, the duly appointed trustee of the estates of said bankrupts. No answer has been filed to the petition, and the question is whether upon the facts stated the order in the district court should be revised.

The policies in question were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wisconsin, and were respectively numbered 206,383 and 303,921, and were respectively for the amounts of $5,000 and $2,000. Daniel L. Holden was the insured in both, and Lizzie Holden was the beneficiary

in both, with the provision, however, that if she should not survive him payment should be made to his executors, administrators and assigns.

It was provided in the policy No. 206,383 that it is "issued on the semi-tontine plan, and its tontine dividend period is twenty years," and the following is endorsed on the policy: "Upon
18 surrender by the insured and beneficiary of a policy of $10,000 of like number and kind dated May 2nd, *1890, this* policy for $5,000 is issued at their request in lieu of one-half of the former policy; in all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life non-participating policy, No. 303,931, for $2,000 is issued in consideration of the surrender of one-half of the orignal policy."

It is alleged in the petition that the policies have a present cash surrender value combined of about $2,200; and it was stated on the argument that the creditors of each of the bankrupts are the same.

It is provided by the laws of the State of Washington "that the proceeds or values of all life insurance shall be exempt from all liability for any debt." (Laws 1895, p. 336.)

By section 70–*a* of the bankrupt law of 1898 it is provided that "the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment or qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests and patents, patent rights, copy-rights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 6 of the bankrupt law is as follows: "Exemptions of bankrupts. *a*—This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have

had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The effect and extent of section 6 was considered by this court in the matter of Scheld, 44, C. C. A., 233, 104 Fed. Rep., 870, and it was said, that the purpose of the section did not pervade the whole act, but was controlled by section 70–*a*, and that under the latter section policies of insurance payable to the bankrupt himself, his estate or personal representatives passed to the trustee of the estate. But we also said, "It will be seen that the clause of section 70 above quoted does not include policies of insurance payable to the wife, children or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate or personal representatives. The enactment does not deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the bankruptcy act."

What is the character of the policies in the case at bar? Are they covered by the proviso of section 70? It will be observed that the policies were not payable to either Holden or his wife absolutely but to her only, if she survived him, and to his personal representatives if he survived her. Subject to such contingent interest in him the policies and the money to become due under them belong to her, and it is beyond his power to transfer them to any other person or to surrender them. *In re* Heilbron's estate, 14 Wash. 336 citing Central Bank of Washington *v.* Hume, 128 U. S. 195, and other cases. Under the laws of Washington her interest in the policies became her separate property and was assignable by her,—2 May on Insurance 399 Q, and cases cited. Each therefore, has an interest in the policies, and each must be held to have an insurance policy which has a cash surrender value payable to him or to her, his or her estate or personal estate or personal representatives, and subject therefore to the provisions of section 70—in other words, passed to their respective trustees as assets of their respective estates. It may be that neither could surrender the policies without the consent of the other, but such right of surrender passed with the policies to their respective trustees.

In Steele *et al. v.* Buel *et al.* 44 C. C. A. 287, the circuit court of appeals of the eight circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling *in re* Scheld. There is a way open to respondents for a further review of the questions involved.

It follows that the order of the district court should be revised in accordance with this opinion, and it is so ordered.

(Endorsed:) Amended opinion. Filed January 16, 1902. F. D. Monckton, clerk.

20 United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Appeal from the district court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the order or decree of the said district court in this cause be, revised in accordance with the opinion of this court.

(Endorsed:) Decree (second). Filed and entered Jan. 16, 1902, F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729. Appeal.

The above-named bankrupts D. N. Holden and Lizzie Holden, conceiving themselves aggrieved by the decree entered on January 16, 1902, in the above-entitled proceeding, do hereby appeal from said decree to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for D. N. Holden and Lizzie Holden,
72 *Hinckley Block, Seattle, Wash.*

And now, to wit, on February 12th, 1902, it is ordered that the appeal be allowed as prayed for.

WM. B. GILBERT,
Senior Circuit Judge.

(Endorsed:) Appeal and order allowing appeal. Filed Feb. 12, 1902. F. D. Monckton, clerk. Copy of this order received this 13th February, 1902. Bausman & Kelleher, counsel for appellee.

21 In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of DANIEL N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Comes now the above-named bankrupts, Daniel N. Holden and Lizzie Holden, by their solicitors, P. P. Carroll and John E. Carroll, and make the following assignment of errors, in the opinion and decree of this honorable court, filed herein respectively, on the 6th, and 16th, day of January, A. D. 1902.

First. It was error to find and hold that the life-insurance policies issued on the 15th day of June, 1904, and numbered respectively, 206,383, and 303,921, to Daniel N. Holden, for the respective sums of $5,000.00 and $2,000.00, were not exempt under the bankrupt law.

Second. It was error to order that the decree of the district court, allowing said bankrupts' claim of exception, be set aside.

Third. It was error not to find and hold that said policies of insurance and the proceeds thereof, were exempt under the bankrupt act, from all claims of the creditors of said bankrupts.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Appellants.

(Endorsed:) Assignment of errors. Filed Feb. 17, 1902. F. D. Monckton, clerk. Due service admitted and copy received this 17 day of February, 1902. Bausman & Kelleher, solicitors for appellee.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of DANIEL N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Ordered that the above-named bankrupts be, and are hereby, allowed to prosecute their appeal to the Supreme Court of the United States without bond.

WM. B. GILBERT,
United States Circuit Judge.

To the entry of the foregoing order appellee Stratton, trustee, consents and that the appeal be prosecuted without bond, appellants advancing their own costs.

FREDERICK BAUSMAN,
Solicitor for Stratton, Trustee, Appellee.

(Endorsed:) Order and waiver of bond. Filed Feb. 17, 1902. F. D. Monckton, clerk.

22 United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN. No. 729.

Certificate of Clerk Circuit Court of Appeals to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing thirty-eight (38) pages, numbered from one (1) to thirty-eight (38), inclusive, to be a full, true and correct copy of the printed record, and of the assignment of errors, and of all proceedings in the above-entitled matter as the same appear of record in my office, and that the same together constitute the transcript of record on appeal herein to the Supreme Court of the United States.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 19th day of March, A. D. 1902.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

UNITED STATES OF AMERICA, ss:

The President of the United States to J. A. Stratton, trustee, and to Bausman & Kelleher, his solicitors, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia within sixty days from the date hereof, pursuant to an order allowing an appeal of record in the office of the clerk of the United States circuit court of appeals for the ninth circuit in the matter of D. N. Holden and Lizzie Holden, bankrupts, and to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, senior United States circuit judge for the ninth circuit this 13th day of February, A. D. 1902.

WM. B. GILBERT,
United States Circuit Judge.

Service hereof by copy admitted this 13th day of February, A. D. 1902.

BAUSMAN & KELLEHER,
Solicitors for J. A. Stratton, Trustee.

(Endorsed:) No. 729. U. S. circuit court of appeals for the ninth circuit. In the matter of D. N. and Lizzie Holden bankrupts. Citation on appeal to Supreme Court U. S. Filed Feb. 13th, 1902. F. D. Monckton, clerk.

23 The above and foregoing transcript of record of appeal to the Supreme Court of the United States, in the matter of D. N. & Lizzie Holden is approved.
Dated at Seattle Mar. 24th 1902.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Appellants.

Endorsed on cover: File No. 18,493. U. S. C. C. of appeals, 9th circuit. Term No. 301. D. N. Holden and Lizzie Holden, bankrupts, appellants, *vs.* J. A. Stratton, trustee. Filed April 14th, 1902.

24 In the Supreme Court of the United States, October Term, 1902.

D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts, Appellants,
vs.
J. A. STRATTON, Trustee, Appellee. } No. 301.

Certificate.

Whereas, the above-named appellants were duly adjudged bankrupts in the United States district court for the district of Washington, northern division, on the 25th day of February, 1901; and

Whereas, appellants duly claimed two certain life-insurance policies as exempt to them under the acts of Congress relating to bankruptcy; and

Whereas, said claim of exemption was allowed by said district court; and

Whereas, on petition to review, the United States circuit court of appeals for the ninth circuit disallowed said claim of exemption;

Whereas, it appears that the United States circuit court of appeals for the eighth circuit allowed a similiar claim of exemption;

Now, therefore, on motion of P. P. Carroll and John E. Carroll, solicitors for appellants, this is to certify that in my opinion the determination of the question, or questions, involved in the allowance or rejection of appellants' said claim of exemption to said life-insurance policies is essential to a uniform construction of said bankruptcy act throughout the United States.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 301. In the Supreme Court of the United States. D. N. Holden & Lizzie Holden, bankrupts, appellants, *vs.* J. A. Stratton, trustee, appellee. Certificate. Carroll & Carroll, att'ys for appellants, 72 Hinckley block, Seattle.

(Endorsed:) File No. 18493. Supreme Court U. S., October term, 1902 Term No. 301. D. N. Holden *et al.*, app'ts, *vs.* J. A. Stratton, trustee. Certificate of Mr. Justice McKenna. Filed March 20, 1903.

25 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of Daniel N. Holden and Lizzie Holden, bankrupts, No. 729, which suit was removed into the said circuit court of appeals by virtue of a petition for revision and review of an order of the district court of the United States for the district of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
26 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of March, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

27 [Endorsed:] D. File No. 19,272. Supreme Court of the United States. No. 621, October term, 1903. D. N. Holden and Lizzie Holden, *vs.* J. A. Stratton, trustee. D. No. 729. United States circuit court of appeals for the ninth circuit Writ of certiorari. Filed April 2, 1904, F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

28 In the Supreme Court of the United States.

D. N. HOLDEN and LIZZIE HOLDEN, Petitioners,
vs.
J. A. STRATTON, Trustee, Respondent.
} No. 621, Oct. Term, 1903.

It is hereby stipulated and agreed by and between P. P. Carroll & John E. Carroll, counsel for the above named petitioners, and Frederick Bausman, counsel for the above named respondent, that the record heretofore filed in the above entitled court on the application for the writ of certiorari be considered the record upon return to the said writ; and the clerk of the United States circuit court of appeals for the 9th circuit be directed to attach a certified

copy of this stipulation to said writ in connection with his formal return thereto.

It is further stipulated and agreed that the record filed in that certain cause, No. 301, Oct. term, 1902, in the above entitled court, entitled D. N. Holden and Lizzie Holden, appellants, *vs.* J. A. Stratton, trustee, appellee, may be considered by the court as the record in this cause.

Dated this 5th day of April, 1904.

FRED. BAUSMAN,
Counsel for Respondent.
P. P. CARROLL,
JOHN E. CARROLL,
Counsel for Petitioners.

(Endorsed:) Stipulation as to return to writ of certiorari. Filed Apr. 9, 1904, F. D. Monckton, clerk.

29 United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a true copy of a stipulation as to return to writ of certiorari filed in the above entitled matter on the 9th day of April, 1904, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 11th day of April, A. D., 1904.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

30 United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts. No. 729.

Return to Writ of Certiorari.

By direction of the honorable, the judges of the United States circuit court of appeals for the ninth circuit, I, Frank D. Monckton, clerk, in obedience to the annexed writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honorable the judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the

said Supreme Court the record and proceedings in the above entitled matter, do attach to the said writ a certified copy of a stipulation entered into between the counsel for the respective parties to the said matter on the 5th day of April, 1904, the original of which stipulation is of record in my office, and do hereby certify the same as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 11th day of April, A. D., 1904.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.

31 [Endorsed:] File No. 19,272. Supreme Court U.S. October term, 1904 Term No. 209. D. N. Holden *et al.* petitioners *vs.* J. A. Stratton trustee Writ of certiorari and return. Filed April 21", 1904.

IN THE

Supreme Court of the United States

OF AMERICA

In the matter of the petition of D. N. HOLDEN and LIZZIE HOLDEN for a Writ of Certiorari, directed to the Circuit Court of Appeals for the 9th Circuit, to bring before the Supreme Court the case of In re HOLDEN et ux.	No._____

NOTICE.

Sirs:—Please take notice that upon the annexed petition of D. N. Holden and Lizzie Holden, sworn to the 5th day of February, 1904, we shall move the motion here-

to annexed before the Supreme Court of the United States at the capitol in the City of Washington, District of Columbia, on Tuesday, the 23rd day of February, 1904, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Dated Seattle, February 5, 1904.

Yours, etc.,

P. P. CARROLL,

JOHN E. CARROLL,

Solicitors for Petitioners.

72 Hinckley Block, Seattle, Wash.

To James A. Stratton, Trustee, and Messrs. Bausman and Kelleher, his solicitors.

Copy of within notice and motion for writ of certiorari received this 11th day of February, 1904.

BAUSMAN & KELLEHER.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

In the matter of the petition of D. N. HOLDEN and LIZZIE HOLDEN for a Writ of Certiorari, directed to the Circuit Court of Appeals for the 9th Circuit, to bring before the Supreme Court the case of In re HOLDEN et ux.	No._____

MOTION FOR WRIT OF CERTIORARI.

And now come the petitioners above named, by P. P. Carroll and John E. Carroll, their solicitors, and move this Court, upon the annexed petition, sworn to the 5th day of February, 1904, for a Writ of Certiorari, directed to the Circuit Court of Appeals for the Ninth Circuit and to the District Court of the United States for the Northern Division of the State of Washington, to bring before this Honorable Court the case of In re Holden et ux, recently decided by the Circuit Court of Appeals of the United States for the Ninth Circuit, and by the District Court of the United States for the Northern Division of Washington, for such proceedings therein as to this Court may seem

just; and for such other and further relief in the premises as may be just.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

In the matter of the petition of D. N. HOLDEN and LIZZIE HOLDEN for a Writ of Certiorari, directed to the Circuit Court of Appeals for the 9th Circuit, to bring before the Supreme Court the case of In re HOLDEN et ux.

The petitioners respectfully show to this Court as follows:

Your petitioners were at the time of the commencement of this suit and are now citizens and residents of the State of Washington, and J. A. Stratton was and is the trustee in bankruptcy of D. N. Holden and Lizzie Holden, bankrupts.

In January, 1901, The First National Bank of Seattle, Washington, filed in the United States District Court, for the District of Washington, Northern Division, its peti-

tion setting forth that petitioner was a creditor of Daniel N. Holden and Lizzie Holden, his wife; that said Holdens were insolvent, and praying that they be adjudged to be bankrupts within the purview of the Acts of Congress relating to bankruptcy.

Said Holden and wife, in answer to said petition, admitted their insolvency and prayed to be adjudged bankrupts, and James A. Stratton, Esq., was duly elected and qualified as trustee in bankruptcy of their estate under the laws of the United States. Subsequently petitioners claimed among other property exempt under the state law certain policies of life insurance which had been delivered to the trustee. These policies were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wisconsin, and are numbered respectively 206,383, for $5,000.00; and 303,921 for $2,000.00. In both, Daniel N. Holden is the insured and Lizzie Holden, his wife, is named as the beneficiary. (The policies, according to the claim of the trustee, if allowed, have a present combined cash surrender value of about $2,200.00. That they have any cash surrender value, we deny. This is one of our contentions.)

The Referee in Bankruptcy, Hon. John P. Hoyt, ex-Chief Justice of the Supreme Court of the State of Washington, ruled on June 17th, 1901, that said policies were not exempt, but passed and were vested in the said trustee. But the referee in the certificate disallowing the exemption add, "In justification of said ruling, I desire to

state and certify that if this question had been in my opinion, an open one in this circuit, I should have held that said policies of insurance were, under the term of said Bankrupt Laws, exempt to the Bankrupts and did not pass to the trustees; but the Court of Appeals of this Circuit, having in the case of In re Scheld, 104 Fed. 870, passed upon this question and there being in my opinion no reason for distinguishing the case at bar from the above cited case, I feel bound to decide and certify as above stated. As Referee I do not feel that I would be justified in attempting to distinguish that case from this one, nor to make a ruling without regard thereto even although I am satisfied that the Court, in deciding said case improperly interpreted the bankrupt law of the United States."

On July 16th, 1901, the District Court, after an exhaustive presentation of the issue by counsel for petitioners and said trustee, entered an order setting aside the action of the Referee and directing that said policies be turned over to petitioners as exempt. Whereupon, said trustee applied to the United States Circuit Court of Appeals for the Ninth Circuit for a revision and review of the said order of the District Court to the end that the claim of exemption of petitioners be denied and the action of the lower court corrected.

On January 16th, 1902, the decree of the said Circuit Court of Appeals was filed, setting aside the said order of

the District Court and declaring said policies to be not exempt.

In re Holden, 51 C. C. A. 97; 114 Federal Reports 650.

The Court in said opinion closed with this paragraph:

"In Steele et al. v. Buel et al., 44 C. C. A. 287, the Circuit Court of Appeals of the Eighth Circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling in re Scheld. There is a way open to respondents for a further review of the questions involved."

On February 12th, 1902, and within 30 days of the entering of the decree by the Circuit Court of Appeals, these petitioners appealed to this Court. Said appeal was duly perfected and on November 16, 1903, on motion of said trustee, this Court dismissed their appeal, holding that appeals to this Court do not lie from the decisions of the Circuit Court of Appeals in the exercise of their powers of revision; but that certiorari does lie.

Holden vs. Stratton, 24 Supreme Court Reports 45.

On March 20, 1903, the following certificate of his Honor Justice McKenna was filed in this Court, to-wit:

"Whereas, the above-named appellants were duly

adjudged bankrupts in the United States district court for the district of Washington, northern division, on the 25th day of February, 1901; and

Whereas, appellants duly claimed two certain life-insurance policies as exempt to them under the acts of Congress relating to bankruptcy; and

Whereas, said claim of exemption was allowed by said district court; and

Whereas, on petition to review, the United States Circuit Court of Appeals for the ninth circuit disallowed said claim of exemption;

Whereas, it appears that the United States Circuit Court of Appeals for the eighth circuit allowed a similar claim of exemption;

Now, therefore, on motion of P. P. Carroll and John E. Carroll, solicitors for appellants, this is to certify that in my opinion the determination of the question, or questions, involved in the allowance or rejection of appellants' said claim of exemption to said life insurance policies is essential to a uniform construction of said bankruptcy act throughout the United States.

JOSEPH McKENNA,

Associate Justice of the Supreme Court of the U. S."

The Circuit Court of Appeals for the 9th Circuit, in re Scheld, 104 Federal Reports 870, held such policies to be not exempt, and as stated above, the Circuit Court of Appeals for the 8th Circuit in Steel v. Buel, 104 Fed. 968, declared that such policies were exempt.

In perfecting their said appeal your petitioners duly filed in this Court a transcript of the record from the

United States Circuit Court of Appeals for the 9th Circuit, and a brief, and said record and brief having been before this Court, your petitioners especially refer to the same and request the Court to take the same into consideration in passing upon the merits of this petition.

The questions and propositions of law involved in this case are:

Was it error to find and hold that the Life Insurance Policies issued to Daniel N. Holden on the 15th day of June, 1894, and numbered respectively 206,383 and 303,921, for the respective sums of $5,000.00, and $2,000.00, were not exempt under the Bankrupt Law?

Was it error to order that the decree of the District Court allowing said Bankrupts' claim of exemption, be set aside?

Was it error not to find and hold that the said Policies of Insurance and the proceeds thereof were exempt under the Bankrupt Act from all claims of the creditors of said Bankrupts?

The laws of Washington provide that the proceeds or avails of all life insurance shall be exempt from all liability for any debt.

Laws of Washington, 1897.

All of the liabilities of your petitioners were con-

tracted subsequent to September 1st, 1900.

By section 6 of the bankrupt law of 1898, it is provided that bankrupts shall have the exemptions which are *prescribed* by the state law of their domicile. Section 70 of the act provides, under a proviso, that when any bankrupt shall have any insurance policy which has a cash surrender value, the policy shall pass to the trustees as assets. Does the rule of exemption in Sec. 6 pervade the whole act; and if not, have the policies a cash surrender value?

In re Welling (C. C. A.) 113 Fed. 189.

Policy No. 206,383, for $5,000.00. The company by this contract agrees that, upon the payment of $233.80 on the 21st day of May in every year during the first ten years from May 21st, 1890, it will pay the said insurance to Lizzie Holden, wife of D. N. Holden, the insured, within sixty days after due proof of the fact and cause of the death of said insured. The premiums have all been paid. The policy contained the statement that it is issued on the Semi-Tontine Plan, and its Tontine Dividend Period is twenty years, and that the policy shall share in the surplus, according to company's usage, at each distribution after twenty years from May 21, 1890. There is endorsed upon the policy certain options which the insured may have upon the completion of the Tontine Dividend Period. The policy does not provide for any cash surrender value. Therefore, according to the Welling case, it does

not fall within the provisions of section 70 of the Bankrupt Act relating to a cash surrender value.

Another important question to be decided in this case is:

Has Congress the power to abrogate state exemption laws?

Whatever is not conferred in the Constitution is withheld and belongs to the several states, or to the people thereof.

Cooley's Principles of Constitutional Law, p. 29.

Any enactment of Congress which is opposed to the provisions of the Constitution, or is not within the grant of powers made by it, is unconstitutional.

Idem, p. 31.

Hence, as no such grant has been made to it, Congress has never claimed the right to abrogate state exemption laws.

In re Beckerford, 1 Dillon 45.

Nor is any such right properly an incident to an expressed power in the Constitution, and necessary to its execution.

But to give the exemption phase of the Bankrupt Act the construction contended for by the Trustees, and as

laid down by the Circuit Court of Appeals, would in effect be giving to Congress the unauthorized power to abrogate and annul state exemption laws.

Your petitioners have at all times promptly pursued in good faith the mode of procedure which to them seemed proper in the premises, and inasmuch as they had no precedent under the new law and practice they cannot be held to be negligent in the manner of bringing the matter before this Court.

In your opinion dismissing said appeal this Court held; referring to the bankrupt law:

"That under a reasonable construction of subdivision "d" of section 25, Certiorari lies to decrees in revision."

Subdivision "d," section 25, is as follows:

"Controversies may be certified to the Supreme Court of the United States from other courts of the United States and the former court may exercise jurisdiction thereof and issue writs of Certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

You seem to hold in your opinion in dismissing said appeal that section 25, "d," takes the place in the practice in bankruptcy of the usual practice of Certiorari from the Supreme Court, being 26 United States Statutes 828. You will observe that there is no limitation of time under

section 25, "d," as to when the application for Writ of Certiorari must be applied for.

Whether or not an application for Writ of Certiorari is timely must be left to depend upon the circumstances of each case. The fact that the mandate of the Circuit Court of Appeals has gone down does not preclude the Writ of Certiorari from the Supreme Court to review a decision of the Circuit Court of Appeals.

The Conqueror, 166 United States 110.
Bank v. Cooper, 20 Wall. 171.

Reasonable time in this case should be passed upon and begin to run from the time it was dismissed by the Supreme Court, inasmuch as your petitioners were making every effort to get the matter before your honors.

The greater the power of the Court the more liberal it should be in its holdings to meet out justice. Whether or not this writ is timely is entirely within the discretion of this Court.

Your petitioners further aver that the present case is one in which it is proper for this Court to issue a Writ of Certiorari for the following reasons, among others, because:

a. It involves questions of construction of such great magnitude and of unusual merit.

b. The decisions of the Circuit Court of Appeals

of the 8th and 9th Circuits are diametrically opposed to each other.

c. The questions of law involved herein have not been passed upon by this Court.

d. Public interests and the interests of jurisprudence require the decision of this Court on the questions of law involved herein.

D. N. HOLDEN,
LIZZIE HOLDEN,
Petitioners.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Petitioners.

United States of America, ss.
District of Washington.

D. N. HOLDEN and LIZZIE HOLDEN, being duly sworn, say and each for himself or herself says: I have read the foregoing petition. The same is true to my own knowledge, information and belief; my knowledge is de-

rived from the record in this case and from what has taken place in this matter in my presence and hearing.

D. N. HOLDEN,
LIZZIE HOLDEN.

Sworn to before me this 11th day of February, 1904.

(Seal.) P. P. CARROLL,
Notary Public in and for the State of Washington,
Residing at Seattle.

We hereby certify that we have examined the foregoing petition, and in our opinion the petition is well founded, and that the case is one in which the prayer of the petitioners should be granted by this Court.

P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Petitioners.

Copy of within petition received this 11th day of February, 1904.

BAUSMAN & KELLEHER.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

DANIEL N. HOLDEN and LIZZIE HOLDEN, Bankrupts,
Petitioners,
vs.
J. A. STRATTON, Trustee.

No. 209

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE.

In January, 1901, The First National Bank of Seattle, Washington, filed in the United States District Court, for the District of Washington, Northern Division, its petition setting forth that it was a creditor of Daniel N. Holden and Lizzie Holden, his wife; that said Holdens were insolvent, and praying that they be adjudged to be bankrupts within the purview of the Acts of Congress relating to bankruptcy (Record, p. 9).

Said Holden and wife, in answer to said petition, (Record, p. 12) admitted their insolvency and prayed to be adjudged bankrupts, and James A. Stratton, Esq., was duly elected and qualified as trustee in bankruptcy of their estate

under the laws of the United States. Subsequently petitioners claimed among other property exempt under the state law certain policies of life insurance which had been delivered to the trustee (Record, p. 9). These policies were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wisconsin, and are numbered respectively 206,283 for $5,000.00; and 303,921 for $2,000.00. In both, Daniel N. Holden is the insured and Lizzie Holden, his wife, is named as the beneficiary (Record, p. 4). (The policies, according to the claim of the trustee, if allowed, have a present combined cash surrender value of about $2,200.00. That they have any cash surrender value, we deny. This is one of our contentions).

The Referee in Bankruptcy, Hon. John P. Hoyt, ex-Chief Justice of the supreme court of the State of Washington, ruled on June 17th, 1901, that said policies were not exempt, but passed and were vested in the said trustee. But the referee in the certificate disallowing the exemption added: "In justification of said ruling, I desire to state and certify, that if this question had been in my opinion, an open one in this circuit, I should have held that said policies of insurance were, under the term of said bankrupt laws, exempt to the bankrupts and did not pass to the trustees; but the court of appeals of this circuit, having in the case of In re Scheld, 104 Fed. 870, passed upon this question and there being in my opinion no reason for distinguishing the case at bar from the above cited case, I feel bound to decide and certify as above stated. As referee I do not feel that I would be justified in attempting to distinguish that case from this one, nor to make a ruling without regard thereto even although I

am satisfied that the court, in diciding said case improperly interpreted the bankrupt law of the United States."

On July 16th, 1901, the district court, after an exhaustive presentation of the issue by counsel for petitioners and said trustee, entered an order setting aside the action of the referee and directing that said policies be turned over to petitioners as exempt (Record, p. 3). Whereupon, said trustee applied to the United States circuit court of appeals for the ninth circuit for a revision and review of the said order of the district court to the end that the claim of exemption of petitioners be denied and the action of the lower court corrected (Record, p. 9).

On January 16th, 1902, the decree of the said circuit court of appeals was filed, setting aside the said order of the district court and declaring said policies to be not exempt (Record, pp. 18—21).

The petition for a writ of certiorari herein was granted on the 22d day of March, 1904 (Record, p. 25).

SPECIFICATION OF ERRORS.

It was error to find and hold that the life insurance policies issued to Daniel N. Holden on the 15th day of June, 1894, and numbered respectively 206,383 and 303,921, for the respective sums of $5,000.00, and $2,000.00, were not exempt under the bankrupt law.

It was error to order that the decree of the district court allowing said bankrupts' claim of exemption, be set aside.

It was error not to find and hold that the said policies of insurance and the proceeds thereof were exempt under the

bankrupt act from all claims of the creditors of said bankrupts.

ARGUMENT.

In the year 1897, the legislature of the state of Washington enacted, "That section 1 of an act entitled 'An act exempting the proceeds of life insurance from liability for debt, and declaring an emergency,' approved March 20, 1895, is amended as follows:

"Section 1. That the proceeds or avails of ALL life and accident insurance shall be exempt from all liability for any debt.

"Section 2. An emergency exists, and this act shall take effect immediately."

Laws of Washington 1897, page 70.

It is stipulated by petitioners and respondent, "That all and every of the liabilities of said bankrupts were made and contracted between the first day of September, 1900, and the first day of December, 1900 (Record, p. 11).

By Section 6 of the bankrupt law of 1898, it is provided that bankrupts shall have the exemptions which are prescribed by the state law of their domicile. Section 70 of the act provides, under a proviso, that when any bankrupts shall have any insurance policy which has a cash surrender value, the policy shall pass to the trustees as assets.

The absolute and unqualified rule of exemption as declared

in section 6 is not negatived by the proviso in section 70, and the Holden policies are exempt.

Steele v. Buel, 104 Federal Reporter, p. 968.

Pulsifer v. Hussey et al, 54 Atlantic Rep. 1076.

The rule of exemption in section 6 prevades the whole act.

Lockwood v. Exchange Bank, 23 Supreme Court Rep. 751.

The honorable circuit court of appeals for the ninth circuit in *Re Scheld,* 104 Fed. Reporter, 870, being the decision referred to by Referee Hoyt, in his said certificate in this cause to the district court, and by his honor, Justice McKenna, in the decision of this cause in the court of appeals, held that the proviso in section 70 is a specific limitation on section 6, and that the title to life insurance policies having a cash surrender value vests in the trustee, notwithstanding the exemption under the state laws.

In the Scheld case, the court of appeals does not make any extended analysis of the bankrupt act, but simply lays down the broad proposition that "the fact that this special clause is preceded by the word 'provided' does not in any sense limit the force thereof," citing *Railroad Co. v. Smith,* 128 U. S. 174.

But that part of Railroad Co. v. Smith, in regard to the term "provided" is mere *obiter dictum,* and was in no way necessary to and was not considered as a ground for the

decision. And certainly the learned court in the Scheld case did not take into consideration the policy of congress to always exempt to debtors and bankrupts the property exempt to them by the state law; nor the rule of law requiring them to give to the bankrupt act such a construction as would harmonize and give effect to each and every part thereof.

Pulsifer v. Hussey, supra.

Lockwood v. Exchange Bank, supra.

It seems a forced construction to say that "giving to the words used in section 70 their usual and fair import, they clearly declare that policies of insurance of the character of that in issue in this case pass to the trustee as part of the assets of the bankrupt."

In the Scheld case, the court cites in *Re Lange* (D. C.) 91 Fed. 361, in support of their position, that the policies were not exempt. The doctrine in the Lange case was also urged but overruled in *Steele v. Buel*, supra, for as is therein stated "the district court, somewhat doubtingly, confirmed the ruling of the referee, on the authority of a previous decision of that court in *Re Lange* (D. C.) 91 Fed. 361, and thereupon the bankrupts appealed the case to this court." Judge Shiras, who decided the Lange case, afterwards in *Re Steele*, 98 Fed. 79, said: "I freely admit that the question (as to said exemptions) is not free from doubt." This shows an additional weakness in the position taken by the court in *Re Scheld*, which case is made decisive of the case at bar.

Instead of enlarging the rights to property in the trustee, the *proviso* further qualifies and limits them.

Pulsifer v. Hussey, supra.

It has always been the policy of congress to exempt to debtors and bankrupts the property exempt to them by the state law. From the organization of the federal courts under the judiciary act of 1789, the law has been that creditors suing in those courts could not subject to execution property of their debtor exempt to him by the law of the state.

Steele v. Buel, supra, and cases there cited.

Exemption statutes should be liberally construed.

Puget Sound, etc. Packing Co. v. Jeffs, 11 Washington, 466.

In Re Kane, 127 Fed. Rep. 552.

The constitutional requirement of uniformity is not violated by section 6 of the bankruptcy act.

Hanover National Bank v. Moyses, 22 Supreme Court Reports, 857.

A court of bankruptcy is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter.

In *Re Kane*, supra.

The state law, must, independently of other authority, control the decision in this case.

In Re Wilson, 123 Fed. Rep. 20 (C. C. A. 9th circuit).

But for the sake of argument, suppose the proviso in section 70 limits the rule of exemptions as laid down in section 6. The question then arises, do the two Holden policies

come within the definition of policies having a cash surrender value? The term "cash surrender value," as used in the bankrupt act, means the cash value—ascertainable by known rules—of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, having contract right to do so.

In Re Welling (U. S. C. C. A.) 113 Fed. 189.

Pulsifer v. Hussey, supra.

In the case at bar, policy No. 303,921, for $2,000.00, is a non-participating paid-up policy, payable in case of death to Lizzie Holden, the beneficiary therein named. The policy does not contain any provision as to surrender, nor options. In other words it does not come within the above definition. For as was said in Re Welling (supra): "The surrender of the proviso is not the subject of negotiation or agreement, but of right. The proviso does not include those policies where the right to surrender is not given by the contract." And in the present case, as in the Welling case, surrender could only be legally accomplished through agreement with the company by the joint action of Holden and his wife. There exists no right in either the wife or husband, jointly or singly, to surrender. It could only be done by the joint action of the two by agreement with the assurance society. But in the Welling case the court went further and found that while the policy did not fall within the terms of the proviso, the bankrupt had property therein which passed to his trustee, for by the terms of the policy in that case the bankrupt was entitled to receive at the end of the tontine period the cash payment stipulated in the contract. But in the case at bar, the policy under consideration (No. 303,921) does not give any vested

contract rights as to any cash payments upon any dates certain, no payment being stipulated for except the $2,000.00 upon the death of the insured. Hence, in Re Welling directly sustains our position as to the exemption of said policy No. 303,921.

Let us now consider the other Holden policy, No. 206,383, for $5,000.00. The company by this contract agrees that, upon the payment of $233.80 on the 21st day of May in every year during the first ten years from May 21st, 1890, it will pay the said insurance to Lizzie Holden, wife of D. N. Holden, the insured, within sixty days after due proof of the fact and cause of the death of said insured. The premiums have all been paid. The policy contains the statement that it is issued on the Semi-Tontine Plan, and its Tontine Dividend Period is twenty years, and that the policy shall share in the surplus, according to company's usage, at each distribution after twenty years from May 21, 1890. There is endorsed upon the policy certain options which the insured may have upon the completion of the Tontine Dividend Period. The policy does not provide for any cash surrender value. Therefore, according to the Welling case, it does not fall within the provisions of section 70 of the bankrupt act relating to a cash surrender value. But in that case, the court held that though the policy had no "cash surrender value," within the meaning of the proviso, it had an actual value, which constituted a right of property in the bankrupt, and which could have been transferred by him, and therefore passed to the trustee. In the Welling case the law of the state of the domicile of the bankrupt *does not* exempt policies of insurance. But we review it here to show to your Honors that even where the question as to the construction to be given to the

proviso is not raised, there is much difference of opinion as to just what life insurance policies do pass to the trustee, and that even giving the construction to the proviso contended for by the trustee, policy No. 303,921 is exempt, as not having a cash surrender value. After careful study of the case of in Re Welling, we are firmly convinced that the dissenting opinion of Circuit Judge Grosscup in that case states the law correctly, and that this Honorable Court can directly see the force and logic of his position, we cite therefrom the following:

"* * * Another term of the option is (as in the case at bar) that the election shall be by the husband himself. No one else can stand in his place, or exercise the option under the circumstances and sense of obligation that would influence him. * * * I am of the opinion that a fair interpretation of the spirit of the policy would disallow the exercise of the option of Welling until the day for its exercise had arrived, and would then disallow its exercise, unless it be by the judgment of Welling himself. Such an interpretation, of course, forbids the view that the option is transferable in advance—in this case six years in advance—or was subject to levy by creditors."

If in the Welling case the option is not transferable six years in advance, how much more reason there is that in the case at bar, it should not be transferable ten years in advance, and especially as no definite sum is guaranteed in the Holden policy No. 206,383 to be paid upon its surrender at the completion of the Tontine dividend period.

It may not be out of place to refer here to the case of *In Re Heilbron's Estate*, 14 Wash. p. 536, cited by Justice

McKenna in the opinion filed in the circuit court of appeals in this case. In the Heilbron case the policies were made payable to Heilbron's executors in case of his death. By the terms of his will, his brother W. C. Heilbron was bequeathed the sum of $5,000.00. Other legacies were bequeathed by the deceased. The said W. C. Heilbron assigned his interest to the Guarantee Loan and Trust Co. of Seattle. George H. Heilbron died insolvent, and was insolvent at the time of making the will. In that case, according to the opinion of the court, the policies of insurance belonging to the estate were liable for the debts of the deceased, as these debts were incurred prior to the enactment of the law exempting the policies of life insurance from liability for debt. The Holden policies are not payable to the executors of the estate, and the debts were not incurred prior to the enactment of the life insurance exemption law. In the Heilbron case, the estate of the deceased became the benificary, and afortiori the creditors. In this case the wife is made the beneficiary and the policies are only payable upon conditions precedent, or death; and these conditions precedent require the concurrence of three wills, and these conditions or concurrence may be in the future, in fact must be in the future. Three minds must agree before anything can be had from the policies until the consummation of a time certain and fixed in the policies. Can the creditors in this case, through their trustee, force a concurrence of minds? Can they compel the insurance company, against its will, to shorten the time fixed in the policies? In other words, can the trustee destroy the object of the insurance and so destroy or annul the benevolent act of the state?

Should this Honorable court hold that the policies here in issue are not exempt under the bankrupt act, the question

would then arise: has congress the power to abrogate state exemption laws?

Whatever is not conferred in the constitution is withheld, and belongs to the several states, or to the people thereof.

Cooley's Principles of Constitution Law, p. 29

Any enactment of congress which is opposed to the provisions of the constitution, or is not within the grant of powers made by it, is unconstitutional.

Idem. p. 31.

Hence, as no such grant of power has been made to it, congress has never claimed the right to abrogate state exemption laws.

In Re Beckerford, 1 Dillon 45.

Nor is any such right properly an incident to an expressed power in the constitution, and necessary to its execution.

But to give the exemption phase of the bankrupt act the construction contended for by the trustees, and as laid down by the circuit court of Appeals, would in effect be giving to congress the unauthorized power to abrogate and annul state exemption laws.

We beg your Honors' indulgence while we discuss this feature of the case a little further. Under Art. 1, Sec. 8, among other powers, congress has the following: "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy, throughout the United States." And here let us not forget that ours is a Republican form of

government, or in other words, an agreement of the people, for the people, and by the people—a constitutional democracy.

This is implied by articles 9 and 10 of the amendments. The constitution reads thus: (Art. 9)—"The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (Art. 10.)—"The powers not delegated to the United States by the constition, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Here then is a limitation on the powers of congress. It seems to us it cannot be successfully argued that the state has not reserved the power to legislate, within its own sovereign domain, for the people claiming citizenship, personal and property rights within the commonwealth. The state in its beneficence has seen proper to exempt among other property, from liability for debt, life insurance.

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control,—are propositions not to be denied."

Cooley on Principles of Constitutional Law, 61.

McCulloch v. Maryland, 4 Wheat. 316, 431.

"It is true that taxation does not necessarily and unavoidably destroy, and that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very

power would take from the states a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the state a perpetual danger of embarrassment and possible annihilation. The constitution contemplates no such shackles upon state power, and by implication forbids them."

Cooley, Id. p. 62.

The power of the states to protect the lives, health, and property of their citizens, and to preserve good order and public morals is a power originally and always belonging to the states, and not surrendered by them to the general government.

United States v. E. C. Knight Co., 156, U. S. p. 1.

If then the power of the state to protect the lives, health, and property of its citizens, and to preserve good order and public morals, is a power originally and always belonging to the state and has not been surrendered by it to the general government, how will congress undertake within the constitution to annul and abrogate a law exempting the property of a citizen from liability for debt?

Again we put the question to your Honors, has congress the power to abrogate and destroy the exemption laws of a state? Is that not a law regulating property rights?

Respectfully submitted,

P. P. CARROLL,

JOHN E. CARROLL,

Solicitors for Petitioners.

In the Supreme Court of the United States

D. N. HOLDEN AND LIZZIE HOLDEN, *Petitioners*,
vs.
JAMES A. STRATTON, TRUSTEE, *Respondent*
} No.....

BRIEF OF RESPONDENT IN OPPOSITION

There has been served upon the undersigned, as counsel for the respondent trustee, a typewritten brief and notice calling up for February 23d a petition for writ of *certiorari*. That petition is also typewritten. Nor has any printed copy of the record been, so far as we are aware, prepared or ordered to be prepared.

These irregularities may of themselves defeat this application, but other circumstances equally forcible may be drawn to your Honors' attention. The decree sought to be revised is one rendered by the Circuit Court of Appeals for the Ninth Circuit, January 16th, 1902. From that decree, the present petitioners, to whom it was adverse, appealed to this court. Here they were subsequently met by a motion upon our part to dismiss, for the reason that appeal would not lie to the decree complained of, since the latter had been based upon a petition for revision and review in the court of appeals, and could only be revised in this appellate court by other methods. Simultaneously with this motion on our part, the Holdens sought to remedy the defect by obtaining from one of the Justices of this court a certificate of the sort specially provided by

the Bankrupt Act to secure uniform construction of its provisions throughout the courts of the United States. That certificate, which is itself a sort of *certiorari,* was filed on the 20th of March, 1903, and it was before this court when you rendered your decision upon our motion to dismiss at the final hearing of *Holden v. Stratton,* October 22d, 1903. You regarded the certificate as well as the appeal improper and inadequate. Your decision was rendered November 16th, 1903, and since that time three months more have elapsed. The total period between the decree now sought to be revised by *certiorari* and the present time is more than two years, and this, we think, completely violates, without excuse, the rule laid down by this court in *The Conqueror,* 166 U. S. 110; *Ayres vs. Polsdorfer* 187 U. S. 585; *Spencer vs. Duplan Silk Co.* —— U. S. ——, December 21st, 1903. It may be added that in the three months since your decision in *Holden vs. Stratton,* not only has the mandate come down from your court to the court of appeals, and from the court of appeals to the district court, but the district court has itself made an order upon these mandates, requiring the surrender to the trustee of the two policies of insurance now in question, and these policies have under it been surrendered by the clerk to counsel for the trustee. Abundant opportunity has been afforded the petitioners to proceed properly. The trustee feels himself entitled to protest against more.

FREDERICK BAUSMAN,
Counsel for Stratton, Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904

DANIEL HOLDEN AND LIZZIE HOLDEN, BANKRUPTS,
Petitioners,
vs.
J. A. STRATTON, TRUSTEE,
Respondent.

No. 209

Brief for Respondent

STATEMENT.

The Holdens were joint traders (13, II.). When they failed and were proceeded against in bankruptcy, they scheduled liabilities of more than $28,000, but denied substantially that they had an asset to their names (15, 16). The cases against them being then consolidated (2), they acceded to the proceedings, asked to be declared bankrupts with due discharge, and claimed any exemptions allowed by law. (14 III.). *Each* of them was adjudicated a bankrupt (3).

As they denied all assets, the two life insurance policies were of course not disclosed, but these the

trustee has discovered and seeks to retain as trifles, at least, for creditors. The district court ordered the policies to be surrendered to the Holdens, the court of appeals the reverse.

The history of the policies is brief. In 1894 the Holdens had a single $10,000.00 policy that had been in force since May 21, 1890. At their request, in 1894, the company split that policy and took it up, a history of all of which the court may find on page 5 of the record in the form of matter "endorsed" on the face of the larger policy. Two new policies were issued instead. Though issued in 1894, however, they were both made to operate from May 21, 1890, the date of the one original, and are as follows:

They are both on the husband's life in favor of the wife, with *reversion in his favor* on her prior demise, and are both issued June 15, 1894. One issued fully paid for $2,000, required no further premiums (5, 8). The other is a $5,000, semi-tontine twenty-year dividend policy *dating back* to "May 21, 1890, date of former policy," (4) requiring only *ten* payments from *the latter date*, and giving further an option to *the husband* (not the wife), "or his assigns if creditors, "at the end of the twenty years to surrender it for $2,409.55 (7). The bankruptcy occurred in 1901. By that time, therefore, this policy was *paid up*, because ten years only of the premiums were required. The right to draw the $2,409.55, indeed, would not mature until ten years after that, that is to say, in 1910. At

the date of bankruptcy, in other words, the cash was fully earned, though its distribution must be awaited. During this remaining period the wife, as beneficiary, has an interest available by his death, but after this period the policy is his alone in cash if he wants it.

Our subject divides itself into three parts.

Part I. Supposing these not to be "cash surrender" policies under the proviso in Sec. 70 A, are they "property" capable of passing to the trustee?

Part II. Supposing these policies to be of the cash surrender sort, does Section 70 A, which would hold them for the trustee, give way to the state exemption clause?

Part III. Supposing the state exemption applicable, does the Washington law mean, (a) that endowment policies are exempt *to the insured debtor*, in his own life time, and (b) that any kind of policy whatever is exempt from the creditors of a *beneficiary* also?

PART I.

SUPPOSING THESE NOT TO BE "CASH SURRENDER" POLICIES, ARE THEY "PROPERTY" CAPABLE OF PASSING TO THE TRUSTEE?

By Section 70 (a) of the Bankrupt Act, it seems only fair to assume that all property having value was to pass to the trustee. *Page v. Edmunds*, 187 U. S. 596; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12; a mem-

bership in a stock exchange passing by the former, and fire insurance policies by the latter decision. This seems a proper assumption, since only that is exempt which in its nature is exempt, or which is expressly declared to be so. All insurance policies, therefore, are intended to pass to the trustee, where at all events they have passed the point at which they are non-forfeitable. In the case of life insurance policies that have a cash surrender value, these can be saved to the debtor by his paying the trustee the cash surrender amount. Now, Holden makes no such payment. On the contrary, he denies in his brief, though not by any pleading, that these are cash surrender policies at all. Does not this, then, leave the policies irrevocably in the hands of the trustee? No, he replies, it is not merely cash surrender policies that may be saved. These indeed require tender to be saved, but other policies do not have to be saved, for by the section in question they do not pass to the trustee to begin with, because, to quote the act, they are not "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

In other words, the argument of Holden, though on this not clear, makes the language of the proviso about cash surrender policies creative language by which the trustee gets a right over any insurance. To us, the language is of the qualifying sort, so that the trustee, who gets every kind of insurance that has value at all,

is required to give back to the debtor only a cash surrender policy when it is redeemed in what it is good for in cash. The proviso creates, in short, a privilege in the debtor. Where cash value is ascertainable, the debtor may save the insurance; where it is not, the trustee is to retain it.

There are many kinds of insurance, of course, some that carry no unforfeitable value at all, no paid up resting point in whole or in part at any time. Others have paid up features in greater or less degree, others surrender features for cash. It is obvious that even the second class have a value that is fixed, a value clearly assignable by the proper parties, a value which the company itself, though not so required, commonly anticipates if requested, and redeems.

It will be seen, by referring to these two policies, that both are now forever paid up for their whole face values of $2,000 and of $5,000. (See our statement *ante*.) Of both policies it may therefore be said that they have a fixed value. The larger has a fixed value upon death of $5,000, a cash value during life, at any time after the twentieth year, of $2,409.55. Even the larger amount is inevitable, because it depends only upon death. The death amount is not payable to Mrs. Holden absolutely, for if she should die before her husband, he or his representatives would have rights in them again. He cannot assign the death interest without her consent, or she without his, but both together may, for the company, by the terms of the policy, inter-

poses no objection, and only asks (6, 8) that if an assignment be made, notice of it be left at the company's office. We have said that both Holden and the wife must join in assignment, but that Mrs. Holden alone has something of value here is clear, for she could assign her policy severally, and while this would not bind the husband in his lifetime, or his representatives, and would fail in case she died before him, yet if she survived him, the thing would be valuable to the assignee, though the husband's assent had not been given. However, it is perhaps inexpedient to expatiate on what the rights of the Holdens are to assign these policies severally, because they are both bankrupts here, and the creditors of both are the same, while over the assets of both there has been appointed a common trustee, in addition to which the right to the cash surrender at the twentieth year is his alone.

Returning to the subject of whether policies paid up like these, and yet not immediately cash surrender policies, will pass to the trustee, the following cases are directly in point:

In re Slingluff, 106 Fed 154 (D. C. 7, Md.).
In re Welling, 113 Fed. 189 (7th C. C. A.).
In re Diack, 100 Fed. 770 (D. C., N. Y.).
Ladd v. Union Insurance Company, 116 Fed. 878 (C. C., Mo.).
In re Boardman, 103 Fed. 783 (D. C. Mass.).
In re Martens, 131 Fed 972 (D. C., N. Y.).
Gould v. New York Life Ins. Co., 132 Fed. 927 (D. C., Ark.).

The collective judgment of these courts is entirely in favor of trustees having property in policies like those involved in the present case.

These citations are all the more in point because in those the policies were *not paid up for their tontine distribution.* They were, indeed, paid up for more than the three years necessary to save them from forfeiture by a small paid-up policy, but not for the twenty year cash.

In the second case cited, the court says, after deciding that the policies were not of the cash surrender sort:

> "But it does not follow, as was assumed by the court below and the referee, that because the policy does not fall within the terms of the proviso, the bankrupt has not property therein which passes to his trustee. By the terms of the policy, he was entitled to receive at the end of the tontine period, the cash payment stipulated in the contract. That is a vested contract right, contingent only upon his surviving the tontine period. The right is valuable, increasing in value with each successive payment of premium. The policy technically had not a "surrender value" within the meaning of the proviso; but it had an actual value, and that valuable right was right of property existing in the bankrupt. It is the plain provision of the bankruptcy law that all the estate of the bankrupt shall, by operation of law, be vested in the trustee, save such as is specifically excepted by the provisions of the bankruptcy law or by the law of the domicile of the bankrupt."

The policy in that case was a semi-tontine one on the bankrupt's life in favor of the wife, with, as here,

a proportionate paid-up policy upon default after three annual premiums. Such paid-up policy belonged *to the wife*, the whole insurance appears there to have been in her favor, and she was not, as here, a bankrupt herself, but it was held that *his* creditors could retain the policies (there being no state exemptions) because of two things—at the end of the twenty-year period it was he that could exercise the then cash options; second, if she died before him, the whole policy was his. Applying these circumstances to the present case, it is observable that our $5,000 policy had all these conditions, the $2,000 one the latter.

The other cases cited follow the Welling case with ample explanations and reasoning for doing so, and we have not been able to find any cases thus far in conflict with their view.

In *Gould v. New York Life Ins. Co.*, 132 Fed. 927, the cases cited above are approved and their many good reasons reinforced, though in that case the policy was not allowed to pass, because, as only one premium had been paid upon it, there was, so to speak, nothing to its credit.

We accordingly conclude that the paid-up policies in this case were a property right that passed to the assignee in bankruptcy, and are to be collected by him for the benefit of the creditors, unless the exemption features which we are about to discuss will restore them to the bankrupts.

PART II.

SUPPOSING THESE POLICIES TO BE OF THE CASH SURRENDER SORT, DOES SECTION 70 A, WHICH WOULD HOLD THEM FOR THE TRUSTEE, GIVE WAY TO THE STATE EXEMPTION CLAUSE?

The $2,000 policy, though paid up and constituting "property," is clearly not a cash surrender policy, for to no payment is the company obligated except upon death (8). This instrument, therefore, must be passed under the present head. It is clearly "property," on the one hand, but, on the other hand, clearly relegated, with all other property, to whatever may be allowed by state exemption, so we shall leave it now until we take it up under Part III.

This leaves us for discussion the policy for $5,000, and Part II. now subdivides itself into two inquiries:

(a) Is the $5,000 policy a "cash surrender" one within the act?

(b) If it be such, is the debtor saved from tendering its value by the state exemption clause of the bankrupt act?

(a) *Is the* $5,000 *policy a "cash surrender" one within the act?*

In the authorities cited by us under our first head to prove that these policies, whether cash-surrenderable or not, were at least property, will be found several that on the present head of "cash-surrender" appear

to be against us. The policies, they reasoned, though property, and going to the trustee where no state exemption existed, were not of the cash surrender sort. Now, it is not pleasant to applaud a case where it agrees with our needs, and yet to disapprove it where it does not, but this we shall do with what seems to us good reason.

Life insurance policies were originally written to mature only upon death. To withdraw anything during life was the happy conceit of later experience. Of those that allow cash to be realized during life two sorts appear, one permitting the withdrawal at any year after, say, the third, the other at a date at which premiums end. Both involve, of course, a surrender of the policy. Both continue the insurance for some period or other though the surrender is not made. Both give the surrender right, not at the outset, but only at a date when a paid-up interest is also earned, though no more premiums are to be paid.

The policy now in question, this for $5,000, gave Holden a right to "surrender" this policy and receive therefor *in cash* a sum of money. Why is this not a cash surrender policy? Because he has to wait twenty years to get it? Well, is there any policy written that does not require some period of waiting? At least three years is required in any that we have ever heard of.

Was not the language of the act intended to distinguish cash surrender policies only from those that are

called "straight life?" Why should it be given a narrow acceptation and be made to refer only to those that give the cash surrender right at an earlier date? In "straight life" policies it was plainly impossible to calculate value, but not so in those that upon some date or other made it obligatory on the company to accept a surrender for cash in a sum previously fixed, as here, though at the bankruptcy that date might not have matured. The amount could clearly be estimated. Perhaps the company would refuse to discount the liability. No matter. The bankrupt could buy the policy from the trustee. Its price would be a matter of mere computation, for on a day certain this company must take it up at par, or if the bankrupt declined to redeem it, the thing could be sold for cash by the trustee.

In the present instance the policy, remember, is fully paid. It was a "ten year pay—twenty year accumulation" one, as life insurance men would probably call it. To-day it is to the trustee immaterial that the surrender right is not matured. There is not another premium to be paid, no possibility of default. Any purchaser of securities will discount this policy to-day because he knows there is a day when his right to exchange it for cash is absolute.

Is it possible that a statute designed to make bankrupts pay in cash for cash surrender policies will be so construed as to allow this to be kept by them? They can turn it into cash the moment the trustee releases it.

Against our contention is *In re Welling* (113 Fed. 189), which we respectfully deem upon this point erroneous. It may, however, be fairly distinguished from our own case. Here the policy is fully paid and it is absolutely a fixed thing of value. There several premiums were yet to be paid and the company was not liable for any cash surrender at all and liable for no more than that paid-up proportionate policy which was earned after the three year period.

The extreme opposite of this view is that of District Judge Lowell (*In re Boardman*, 103 Fed. 783), who decides that an endowment policy which the company, though yet not compelled to do so, is willing and offers to redeem in cash is a cash surrender one within the act.

This may be going too far the other way. The middle view contended for by us seems unanswerable, that where the policy has reached a point when the cash surrender right is earned, when, though the date of payment is deferred, the company's obligation is fixed, that then the policy, having become discountable like the bond of any large corporation, is a cash surrender one within the language, the spirit, and the only reasonable intent of the enactment.

If this be so, the Holdens having made no tender of the cash value of this $5,000 policy, must lose it, unless it be saved by the state exemption, which we will discuss under Part III.

(b) *If this is a cash surrender policy, is the debtor saved from tendering its cash value by the state exemption clause of the bankrupt act?*

This is the second division of our Part II., and it is to be settled by a view of the whole act.

The question is, does the part of the act giving a bankrupt all the exemptions allowed by the state of his residence prevail over the insurance clause of the same act prescribing that to get back a cash surrender policy, he must tender its value?

It is useless for us to offer anything here. The Eighth and Ninth Circuit Courts of Appeals have exhausted this question with contrary results.

Steele v. Buel, 104 Fed. 968 (8th).
In re Scheld, 104 Fed. 870 (9th).
In re Holden, 114 Fed. 650 (9th).

The District Court of Maryland agrees with the Ninth Circuit.

In re Slingluff, 106 Fed. 154.

And in the Eighth Circuit District, Judge Shiras (before *Steele v. Buel*), was also against the state exemption.

In re Lange, 91 Fed. 361.

PART III.

SUPPOSING THE ESTATE EXEMPTION CLAUSE APPLICABLE, DOES THE WASHINGTON LAW MEAN THAT ENDOWMENT POLICIES ARE EXEMPT TO THE INSURED DEBTOR IN HIS OWN LIFETIME, AND THAT ANY KIND OF POLICY WHATEVER IS EXEMPT FROM THE CREDITORS OF A BENEFICIARY ALSO?

Here we are assuming that these policies though "property," and consequently passing to the trustee, are neither of them cash surrender policies, or that even if they are, the cash surrender proviso of the bankrupt act gives way to its state exemption clause, that the bankrupts did not have to tender cash for either, and that if these policies would be exempt in Washington they are exempt as against the court of bankruptcy.

The sweeping language of the Washington statute—"the proceeds or avails of all life or accident insurance shall be exempt from all liability for any debt"—is this language, we say, to be taken *literally?* If it is to be taken literally, then the following things must be considered as deliberately permitted by it: First, I may *as insured* buy paid-up policies in one or many payments, *payable to myself,* in my own lifetime, and hold them free from creditors; second, I may receive as *beneficiary,* from uncles, parents, or friends, the proceeds or avails of insurance in cash and hold them safe from my creditors; third, no limit being placed on

amounts, I may keep paid-up policies of my own and policies derived from others, be actually rich in this kind of thing, and yet immune from collection. In short, if taken literally, this Washington statute would permit a man to endow himself or a spendthrift nephew with an ample insurance and permit either the insured or his bankrupt nephew to keep a fortune from his creditors.

We shall accordingly argue: *First*, that this Washington exemption must be read in the light of such legislation generally as preceded it throughout the country. *Second*, that the words "life insurance" must be given their popular acceptation of a sum realizable *by death*, and that a technical meaning ought not to be given a law to make it work a plain injustice.

FIRST: PREVIOUS LEGISLATION ELSEWHERE.

It is a settled rule of construing statutes that, even when they are not ambiguous, absurdity or wrong will not be permitted if it can be avoided by reasonable interpretation. Statutes must receive a sensible construction. If a statute, however clear, is going to work wrong or injustice, the history and purposes of the legislation may be resorted to for relief. By this is not meant that a plain statute may be disregarded when courts discern a bad result. Not at all. A harsh statute must continue harsh when its rigors are not only in its words but in its intention. To ascertain that intention by

exploring the history of the act or, if it has no record available, then the history of kindred legislation, is the privilege of courts when a plain law is producing results that law-makers would not ordinarily intend.

In *Rector of Church of Holy Trinity v. U. S.* (143 U. S. 457), there was nothing whatever in the language of the act to abate its rigors. It was as sweeping and clear as any statute ever drawn. Yet it was clear that a result was about to occur which the makers of the law never would have permitted for a moment had they foreseen it. The history of the legislation was therefore examined. Why? To get at its intent. This is no violation of any rule of construction. On the contrary, the rule always has been to give it its intent. That intent must, to be sure, be accepted from its language, unless the language produces wrong or absurdity—then from its history and acknowledged purpose. A common error is to imagine that construction or interpretation is limited to phraseology and to the act itself in its various passages. This is true only when the result, though unsatisfactory, is not injustice or something beyond the spirit of the law.

In *U. S. v. Kirby* (7 Wall. 482), a similar rule was applied.

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this

character. The reason of the law in such cases should prevail over its letter."

So in *Heydenfeldt v. Mining Co.* (93 U. S. 634).

> "If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected."

In *Scott v. Deweese* (181 U. S. 202), this court affirmed the lower court (*Scott v. Latimer,* 89 Fed. 843), in deciding that when the national banking act said that unless all increase of capital was "fully paid" it should be void, it did not mean just that when the purposes of the entire measure were considered. The language was plain, there was nothing in the remainder of the act to contradict or confuse it, but the thing in its literal sense was deemed beyond the legislative intent.

Lee Kan v. U. S. (62 Fed. 914), is instructive.

There a statute relating to Chinamen spoke of such as did business "in his own name." A case arose of one who did business under an assumed appellation. The plain words "in his own name" were held to mean "on his own account." So in *Chinese Merchant's Case* (13 Fed. 605), the requiring of a certificate from all Chinamen was held not to apply to Chinese merchants, for though the act was plain enough in a literal sense, only *laborers* were actually intended. See also *Lau Ow Bew v. U. S.* (144 U. S. 47).

There is not one of these cases in which the statute on its face gave a whit more excuse for a milder meaning than the present.

Let us, accordingly, examine the history of this class of legislation, see when, why, and where it arose, and what the other states had been doing in respect to it by way of example to Washington. We may thus see what was probably in the minds of the Washington legislature when they passed this sweeping, this unqualified, exemption.

This we can do more intelligently by dividing the subject into two parts:

(a) The $5,000 policy.
(b) The $2,000 policy.

We thus divide the subject because in the former the policy is an endowment one, giving the husband cash in his lifetime at a period already nearly approached.

(a) *The* $5,000 *Policy.*

Thirty-five states and territories have passed laws exempting life insurance. Exempting it as a fund *for* whom? Exempting them *against* the creditors of whom?

Twenty-four states and territories have exempted the insurance as a fund, not for the insured, but for the beneficiary. These would thus exclude Holden, the

husband. The same states exempt this insurance only as against the creditors of *the insured.* This, by not including, would exclude Mrs. Holden also.

In other words, when this Washington statute was passed, twenty-four of these thirty-five statutes intended no such thing as that the insured should endow himself with life insurance for his own uses while living, and the same statutes, while making the insurance exempt to *the wife,* as against his creditors, made no such provision as that she might have creditors too and hold the proceeds free. These statutes are in Arkansas (*Sandels and Hills Code,* 1894, Sec. 4944); Delaware (*Code* 1893, Chap. 76, Sec. 3); District of Columbia (*Code* 1902, Sec. 1162); Florida (*Rev. St.* 1892, Sec. 2347); Hawaii (*Civil Laws* 1897, Sec. 1903); Illinois (*S. and C. An. St.* 1896, Vol. 2, p. 2259, Ch. 73, S. 189); Indian Territory (*Stat.* 1899, Sec. 3023); Maryland (*Gen. Laws,* Vol. 1, Secs. 8 and 9, p. 803); Michigan *Comp. Laws* 1897, Sec. 8695); Mississippi (*Ann. Code* 1892, Sec. 1964); Missouri (*Rev. Stat.* 1899, Vol. II, Sec. 7895, p. 1842); New Jersey (*Gen. Stat.* 1896, Vol. II, p. 2019); New Mexico (*Comp. Laws* 1897, Sec. 2042); New York (*Rev. Stat. Code and Gen. Laws,* 3rd ed. (Birdseye), Vol. I, p. 1046, *Domestic Relations Law,* Art. 3, Sec. 22); Pennsylvania (*Pepper & Lewis Dig.* 1896, Vol. I, Sec. 91, Col. 2383); Ohio (*Bates' Ann. Statutes,* 2nd ed., Vol. II, Secs. 3628, 3629); Oklahoma (*Stat.* 1903, Vol. I, p. 795); Rhode Island (*Pub. Stat.* Ch. 166, Sec. 21); South Dakota

(*Rev. Code Civil Pro.* 1903, Sec. 347, p. 929); South Carolina (*Code* 1902, Vol. I, Sec. 1824); Tennessee (*Ann. Code* (Grayson) 1895, Vol. I., Sec. 2294); Vermont (*Stat.* 1894, Sec. 2653); West Virginia (*Code* 1887, Chap. 66, Sec. 456).

Of these states some further restricted the thing by making such exemption to the beneficiary only when a wife, others only to a small sum, a few hundred dollars, under any circumstances.

See in comparison the sweeping monstrosity possible under a liberal interpretation of the Washington law, "the proceeds or avails of all life insurance." To the insured while he lives if he wants to endow himself, to the insured bankrupt from others if they choose to endow him, no limit either, in any amount.

Perhaps the other eleven states afforded a precedent for this? By no means. Five of them: Connecticut (*Rev. Stat.* 1902, Sec. 4548); Kentucky (*Stat.* 1894, Sec. 654); Massachusetts (*Rev. Laws* 1902, Vol. II., Chap. 118, Sec. 73, p. 1154); New Hampshire (*Pub. Statutes* 1901, Chap. 171, Sec. 1); Wisconsin (*Stat.* 1898, Sec. 2347); exempt the policy in the wife's favor only against creditors of the husband, like the other states, or of the person paying the premium. Of the remaining six states, two, North Carolina and Georgia, are too obscure to be made out upon this point at all.

This leaves four to be considered. Alabama (*Code* 1896, Vol. I, Sec. 2607); Iowa (*Code* 1897, Sec. 1805);

Kansas (*Gen. Stat.* 1901, Sec. 3463); Maine (*Rev. Stat.* 1903, Chap. 49, Sec. 106). In Alabama the beneficiary must be the wife (or conversely the husband). In Iowa and Kansas alone is the insured allowed to hold the policy exempt from his creditors, and in these states only can the beneficiary hold the policy against the beneficiary's own creditors. In Maine an exemption is allowed in both instances to $150 only.

Of thirty-five states, then, only two or three gave the insured an insurance exemption against his own creditors, only the same three an exemption against the beneficiary's own creditors too.

Accordingly, if we conceive the Washington legislature to have been adopting a sort of legislation as commonly employed, we must suppose them to have been influenced by the enormous bulk rather than by the minority. If they were following the minority, perhaps they would have followed their language. But this they did not do. The Iowa and Kansas statutes (which we set out below) were careful to describe their intent. Indeed, it was held in Iowa before this act of theirs that language more general in an earlier act would not be construed to give to the *beneficiary's wife* an exemption against her own creditors. *Smedley v. Felt*, 43 Iowa, 607; also in *Murray v. Wells*, 53 Iowa, 256, "It was not intended to exempt the avails of life policies from the debts of the beneficiaries therein."

We conclude, then, that the intention of the Washington legislature was not to go to lengths so unusual.

(b) *The* $2,000 *Policy.*

This is not an endowment policy, but there are three features to be noted immediately: (a) it is paid up fully, (b) though payable to the wife it becomes Holden's if she die before him, (c) Mrs. Holden also is a bankrupt here, so, even if we consider it her's alone, we place her back in the position Holden would be in as against his creditors. She is a bankrupt seeking to hold from *her* (not alone his) creditors a paid up policy on another's life.

Did the Washington law intend to permit this?

Viewed in the light of the legislation that preceded this elsewhere, we do not think it did. Our review of the other statutes makes it clear that this has not been intended, except in Iowa, Kansas, and possibly Maine, in which states particular language is employed to attain it, and in two of which a limit in amount is placed.

But it may be said these states do give this exemption to the wife against *her* creditors. Yes, but they say so in plain words. The trouble with this law of Washington is the excess inevitable from unbridled interpretation. If you deduce from it that Mrs. Holden can keep this from her own creditors, you must give every other beneficiary, whether able-bodied nephew, son, or friend, the same privilege. You cannot construe it for wives and stop. (*Murray v. Wells,* 53 Iowa, 256). A particular statute was deemed necessary in Iowa on

account of just the interpretation we are here maintaining.

This last interpretation is worth nothing as against the reckless dishonesty of purpose easily to be practised under a wide interpretation of the Washington law.

SECOND: WHAT IS "LIFE INSURANCE?"

Let us again turn to the language used, "Life Insurance." What is commonly understood by this term? Why not suppose it to have been used in its ordinary sense? In avoiding an almost absurd conclusion from a law, we may not only examine its history, but we may and should take its words in a common acceptation rather than in a technical one when the technical throws open the door to abuses and the common makes it reasonable. What do people mean by life insurance? Is it not a fund realizable by *death?*

The object of these laws manifestly was to save families from the loss of *both* the insurance and the father —that is, that on his *death* they should not lose also his life insurance. Among all the statutes we have cited there are few indeed that do not make death a condition expressly or impliedly. The court will be struck by this almost uniformity on examination of these laws.

The writer of this brief has not the slightest doubt that what the Washington legislation had in view was to protect widows, to save them from the debts of a *deceased* husband assured. Never did the members

dream that in taking from creditors "all life insurance," they meant its cash proceeds during the life of the insured. Never did they intend that she could keep the money, perhaps a small fortune, from her husband's and her own creditors and he alive besides.

Thus, if merely the wife were in question here, the sweeping interpretation of the words would work a wrong, a wrong which scarcely one of the thirty-five states mentioned permitted in any degree whatever.

But here is more wrong. The husband himself on this interpretation, nay an *unmarried* man, may sequester policies in unlimited sums for use in cash during his own life and keep it from creditors under a statutory exemption! This is preposterous. "Life insurance" must have meant a mortuary fund, the popular signification, and originally the only one.

> "A policy of life insurance is a contract in consideration of certain payments to the insured, for which it undertakes to pay a certain sum upon the death of the person whose life is insured."

This is Kent's definition quoted approvingly in *Talcott v. Field,* — Neb. —, 52 N. W. 400, which says of an endowment policy.

> "It is more like an investment than insurance, the latter being a mere incident. * * * The transaction partakes more of the character of a loan."

It is a settled rule of statutory construction that words are employed in their common acceptation rather than in a technical one.

> "The popular and received import of words furnishes the general rule for the interpretation of public laws." (*Maillard v. Lawrence*, 16 How. 251); "The legislature must be presumed to use words in their known and ordinary signification unless that sense be expelled by the context." (Story in *Levy v. M'Cartee*, 6 Peters 102).

Why this rule should be departed from here to work palpable opportunity for injustice which the lawmakers surely would not have designed, we cannot see.

CONCLUSION.

It is worth while asking whether the Washington law which imposes no pecuniary or other limit upon an exemption is constitutional under the organic law of that state. The constitution of Washington provides:

> "The legislature shall protect by law from forced sale *a certain portion* of the homestead and other property of all heads of families."

If "a certain portion" means a reasonable amount only, then, it seems to us, that an unlimited exemption would be void. It was in this way that a statute exempting insurance without limit was gotten rid of in Minnesota (*How v. How*, 59 Minn. 415, 61 N. W. 456). And in South Dakota the same conclusion was reached (*Skinner v. Holt*, 9 S. D. 427, 69 N. W. 595).

Considering that by the unanimous decisions of the federal courts in bankruptcy *all* insurance goes primarily to the trustee and that its interpreted theory is not to let the bankrupts have it except where it is of the cash surrender sort and can be redeemed in cash by the debtor, a sweeping interpretation of the Washington exemption seems utterly abhorrent to the federal enactment.

Respectfully submitted.

FREDERICK BAUSMAN,
HUGH A. GARLAND,
Counsel for Respondent.

Supreme Court of the United States.

No. 209.—October Term, 1904.

Daniel L. Holden and Lizzie Holden, Bankrupts, Petitioners, *vs.* J. A. Stratton.	On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 8, 1905.]

Separate proceedings in bankruptcy were begun in the District Court of the United States for the District of Washington, Northern Division, against Daniel N. Holden and Lizzie Holden, his wife. They were consolidated. Both the parties were adjudicated to be bankrupt, and J. A. Stratton became the trustee of both estates.

All the liabilities of the bankrupts were contracted between the first day of September and the first day of December, 1900, and the creditors of each were the same. There were two policies upon the life of Daniel N. Holden, one for $2,000, the other for $5,000, issued by the same company. Both bore date June 15, 1894, having been issued as the result of an arrangement by which the insured and his wife as the beneficiary surrendered a policy for $10,000, dated May 21, 1890.

The policy for $2,000 was a full-paid, non-participating one, and the amount became due only upon the death of the insured, and was then payable to the wife, or in the event she did not survive her husband, to his executors, administrators or assigns. The policy for $5,000 was on what was termed the semi-tontine plan. An annual premium of $233.80 was required to be paid for ten years from the date of the previous policy, which had been surrendered, that is, until May 21, 1900, and therefore at the date when the bankrupts contracted the debts set forth in their schedules and at the date of the adjudications in bankruptcy, this period had expired and no further payment of premiums was necessary. Upon the death of the insured the amount of the policy was to be paid to the wife as the beneficiary, or, in the contingency of her prior decease, to the executors, administrators or assigns of the insured. It was provided, however, that upon the completion of the tontine dividend period of twenty ye rs—on May 21, 1910—if the insured was then alive, he or his assigns if creditors, might surrender the policy and receive its full cash value, or a non-participatng policy, payable to the original beneficiary, or if she was not alive, to the executors, administrators or assigns of the insured,

or the option was given to keep the policy in force and to withdraw the surplus to the credit of the policy in cash, or use the same to purchase additional insurance.

The bankrupts made application to have these policies set aside to them, because, it was asserted, they were exempt by the law of the State of Washington. This was resisted by the trustee upon the ground that the policies had a cash surrender value of $2,200, which it was the duty of the bankrupts to pay to the trustee as a condition precedent to the exemption of the policies. The referee sustained the claim of the trustee. His ruling was reversed by the District Court. On a petition for revision the Circuit Court of Appeals held that the bankrupts were obliged to pay the cash surrender value as asserted by the trustee. (113 Fed. Rep. 141.) An appeal was prosecuted to this court and was dismissed. (191 U. S. 115.) This writ of certiorari was then allowed. (193 U. S. 672.)

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The law of the State of Washington upon which the bankrupts relied to sustain the exemption of the policies was originally enacted in 1895, (Laws of Washington, 1895, p. 336,) and was re-enacted in 1897. (Laws of 1897, p. 70.) The original act provided "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt," and the amendment of 1897 enlarged this act by making it also applicable to accident insurance.

The Circuit Court of Appeals held that the policies were not exempt, even although embraced by the State exemption, because of the requirements of section 70 of the bankrupt act of 1898. This was sustained upon the theory that section 6 of the bankrupt act, adopting the exemption laws of the several States, was modified, as to life insurance policies, by a proviso found in section 70*a*. In addition, in this court it is insisted on behalf of the trustee that, even although the construction of the bankrupt act adopted by the Circuit Court of Appeals was a mistaken one, nevertheless the policies were not exempt, first, because the law of Washington making the exemption was in conflict with the constitution of that State; and, second, because the law, even if valid, did not authorize the exemption of policies of the character of those here involved.

As section 6 of the bankrupt act gives effect to the exemptions allowed by the State law, it follows that the contentions that there was no valid State law exempting insurance policies, or that the exemption here claimed is not embraced within the State law, if such law be valid, lie at the threshold of the case, and must be disposed of before we come to consider the true interpretation of the bankrupt law.

To decide the contentions involves purely State and not Federal considerations. No decision of the Supreme Court of the State of Washington holding the exemption law to be invalid because repugnant to the State constitution has been referred to. On the contrary, in *In re Heilbron's Estate*, (14 Wash. 536,) the exemption law in question was considered and upheld by the Supreme Court of Washington. In that case the court maintained the contention that to cause the provisions of the statute to retrospectively apply to debts which had been contracted prior to the passage of the act would render the act unconstitutional, both from the point of view of the Federal as well as the State constitution, and therefore that the law must be construed as having only a prospective operation. All the reasoning, however, of the opinion of the court by which the conclusion referred to was reached assumed as a matter of course that the law, if operating prospectively, was not an unconstitutional exercise of power by the legislature. And it is also worthy of remark that the amendment including accident insurance was adopted by the legislature of Washington subsequent to the decision in *In re Heilbron's Estate*. Of course, as the question of the repugnancy of the statute to the constitution of Washington upon the grounds now asserted was not presented in that case, the decision cannot be said to be conclusive of the question. But it has its due persuasive force.

Considering the contention, however, as an original question, we think its unsoundness is quite clear. The fallacy which the proposition embodies consists in presupposing that because the constitution of the State of Washington provides that the legislature "shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families," thereby a limitation was imposed upon the general power of the legislature to determine the amount and character of property which should be exempt. Two cases are referred to as supporting the contention. (*How* v. *How*, 59 Minn. 415; *Skinner* v. *Holt*, 9 So. Dakota, 427.) But those cases were based upon constitutional provisions widely different from the one here relied upon. To the contrary, in California, where a constitutional provision obtains identical with the one we are considering, (Const. Cal. article XVII, sec. 1,) it has been decided that the character and amount of property which shall be exempt from execution is "purely a question of legislative policy." (*Spence* v. *Smith*, 121 Cal. 536.) And it is further to be observed that the legislature of California has acted under that assumption, and has in effect exempted life insurance policies from execution. Thus it is provided in the Civil Code of California as follows:

"SEC. 3470. Property exempt.—Property exempt from execution and insurances upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares as intention that they should pass thereby. En. March 21, 1872."

Conceding the constitutionality of the statute, it is next insisted that it does not embrace an exemption of the avails of the policies in question. The arguments supporting this contention are somewhat involved, but are all embraced in the following propositions: First, life insurance, it is said, in its strictest and technical sense, relates only to a fund realisable by death, and therefore the words "all life insurance," in the Washington statute, must be given that restricted meaning, hence the statute is inapplicable to one of the policies which partakes of the nature of an endowment. Second, exemptions of life insurance policies, it is asserted, do not generally protect the avails of insurance from pursuit by creditors of the insured, where the proceeds of the policies are payable to his estate, nor do they protect the avails of insurance from pursuit by the creditors of the wife of the insured or other beneficiary. The application of these propositions is based upon the fact that in both of the policies the wife—one of the bankrupts—was named as a beneficiary in the event of surviving her husband, and in one of the policies the husband was entitled, if he survived the twenty-years' period, to surrender the policy and receive its cash value.

To support the propositions the law of many States, limiting the exemption of the proceeds of life insurance policies to the cases specified, are referred to, and the argument is that, because in such States there are such statutes, a similar limitation should be read by construction into the Washington statute. But the error in the argument is manifest. It is not to be doubted that the broad terms of the statute, as ordinarily understood, embrace both of the policies, and it would not be construction but legislation to restrict the meaning of the statute in accord with narrower legislation in other States, because in the judgment of a court it might be deemed equitable to do so. The wide departure from the legislation of many of the other States, shown by the unrestricted terms of the Washington statute, instead of manifesting the intention of the legislature of that State to narrow the exemption to conform to the statutes of other States, on the contrary conclusively shows the intention of the Washington legislature to adopt a broader and more comprehensive exemption. And light upon the intention to give a broad and popular meaning to the term life insurance is shown by the amendment exempting the avails of accident policies, which ordinarily, in the event death does not result, is payable to the insured. And it may also be observed in this connection that the policies considered by the Supreme Court of Washington in *In re Heilbron's Estate, supra,* were payable on the death of the insured to his executors, and no intimation was given in the opinion that policies of that character were not within the terms of the exempting statute.

The policies then being exempt by the State law, we are brought to consider the question whether they were exempt under the bankrupt act of 1898.

As we have said, section 6 of the act adopts, for the purposes of the bankruptcy proceedings, the exemptions allowed by the laws of the several States. The language so providing is as follows:

"SEC. 6. Exemptions of Bankrupt.—(*a*.) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicil for the six months or the greater portion thereof immediately preceding the filing of the petition."

It is beyond controversy that if the section just quoted stood alone the policies in question would be exempt under the bankrupt act. The contention that they are not arises from what is assumed to be a limitation imposed upon the terms of section 6 by a proviso found in section 70*a* of the act. We quote that section in full, italicising the provision which it is deemed operates to take the proceeds or avails of policies of insurance out of the control of section 6:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interest in patents, patent rights, copyrights, and trade marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets;* and (6) rights of action rising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Conflicting views as to the operation upon section 6 of the proviso in section 70*a* referred to have been expounded by the Circuit Courts of Appeal. Two of the leading cases are *Steele* v. *Buel*, (104 Fed. Rep. 968,) holding that the proviso does not qualify the exemptions accorded by section 6, and the other a decision by the Court of Appeals of the Ninth Circuit, in *In re Scheld*, (104 Fed. Rep. 870,) holding that the effect of the proviso was to limit, as to policies of insurance, the broad terms of section 6, adopting the State exemption laws.

Considering the matter originally, it is we think apparent that section 6 is couched in unlimited terms, and is accompanied with no qualification

whatever. Even a superficial analysis of section 70a demonstrates that that section deals not with exemptions, but solely with the nature and character of property, the title to which passes to the trustee in bankruptcy. The opening clause of the section declares that the trustee after his appointment shall be vested "by operation of law with the title of the bankrupt, . . . except in so far as it is to property which is exempt," and this is followed by an enumeration under six headings, of the various classes of property which pass to the trustee. Clearly, the words "except in so far as it is to property which is exempt," make manifest that it was the intention to exclude from the enumeration property exempt by the act. This qualification necessarily controls all the enumerations, and, therefore, excludes exempt property from all the provisions contained in the respective enumerations. The meaning now sought to be given to the proviso cannot in reason be affixed to it without holding that the words "except in so far as it is to property which is exempt," do not control and limit the proviso. But to say this is to read out of the section the dominant limitation which it contains, and, therefore, to segregate the proviso from its context and cause it to mean exactly the reverse of what, when read in connection with the context, it necessarily implies.

It is, however, argued that unless the proviso be given the import attributed to it, and be treated as not subject to the limitation implied by the words creating the exception as to exempt property, that it becomes meaningless, and hence, under the rule of construction which commands that effect must be given if possible to all parts of a statute, the proviso must be construed as wholly disconnected from the clause as to exempt property. The premise upon which this proposition rests is a mistaken one. As section 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso, would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve.

And the meaning which we deduce from the text and context of the proviso is greatly fortified by obvious considerations of public policy.

It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the State exemption laws. This was cogently pointed out by Circuit Judge Caldwell, in delivering the opinion in *Steele* v. *Buel*, where he said (104 Fed. Rep. 972):

"From the organization of the Federal courts under the judiciary act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the State. Judiciary Act of 1789, (1 Stat. 93, c. 21); *Wayman* v. *Southard*, 10 Wheat. 1, 32, 6 L. ed. 253; *Lamaster* v. *Keeler*, 123 U. S. 376, 8 Sup. Ct. 197, 31 L. ed. 238; *Dartmouth Sav. Bank* v. *Bates* (C. C.) 44 Fed. Rep. 546. . . . The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867 (section 5045, Rev. Stat.) but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction."

There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words cash surrender value as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy posiesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867, (*In re Newland*, 6 Ben. 342; *In re McKinney*, 15 Fed. Rep. 535,) and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved, we do not expressly decide it.

The judgment of the Circuit Court of Appeals is reversed, and that of the District Court affirmed; cause remanded to the latter court.

Mr. Justice McKenna took no part in the decision of this cause.

True copy.

Test:

Clerk Supreme Court, U. S.